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Fixing Bail

Samuel R. Wiseman*

ABSTRACT

A large portion of the jail population consists of criminal defendants whose guilt has yet to be established. A growing number of states have attempted to reduce jail populations in light of budget concerns, and many federal and state statutes already direct judges to detain defendants only if alternative conditions will not protect society or prevent pretrial flight. Despite these legislative directives, judges continue to jail too many defendants pretrial. Indeed, although statutes often direct judges not to impose financial conditions leading to detention, many pretrial detainees are in jail because they could not afford the bond set by a judge. As argued here, the explanation for this lies partly in the skewed incentives of trial judges.

This Article applies an agency cost model to bail, observing that the interests of judges diverge from those of their legislative principals, which causes them to err on the side of detention and stiff bond requirements. Judges receive little to no recognition for releasing defendants who pose little threat of flight or violence and are subject to few penalties for detaining them. Yet they, unlike legislators, face the possibility of public scorn (and for elected judges, lost votes) for releasing defendants who flee or commit crimes. Compounding the problem, judges do not internalize the enormous costs to society of detaining millions of defendants pretrial. To fix bail, we must address the principal-agent problem at the heart of the system.

Due to separation of powers concerns, legislatures typically cannot use traditional means of monitoring and controlling agents, such as punishment through compensation reductions or termination of employment. This Article therefore proposes a novel approach—the use of mandatory bail guidelines to rein in judicial discretion, and its concomitant agency costs, in the bail process. Although relying on judges to assess risk was once a necessary evil, the development of statistically validated, actuarial risk assessment tools has made this solution feasible. Relying on actuarial models instead of hurried, poorly-incentivized judges would reduce agency costs and improve accuracy, bringing meaningful change to a deeply troubled system.

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INTRODUCTION

To a casual observer of the criminal justice system, bail might not seem particularly important, at least compared to overcriminaliza-

tion,¹ wrongful convictions,² mass incarceration,³ or other issues that have dominated recent public and scholarly debate. But the decision to detain a defendant pretrial has effects that extend well beyond the interval between charging and disposition. Controlling for the type of charges filed, defendants jailed pretrial—either because they are denied release altogether⁴ (as is increasingly common) or because bail is set at a level they cannot afford—are more likely to be convicted and to receive longer sentences.⁵ They are incentivized to plead guilty even if they are innocent, particularly for low-level crimes with relatively short sentences—if defendants receive credit for the time spent in jail awaiting conviction, the remainder of their detention time can be short, or nonexistent, if they take a plea.⁶ Pretrial detention also has criminogenic effects, as placing pretrial detainees with convicted criminals increases the likelihood that they will pick up criminal ten-

¹ See generally, e.g., DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008) (describing the overcriminalization problem and attempting to develop a theoretical framework for addressing it); Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through A Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1338–46 (2008) (exploring the “political and practical” barriers to decriminalization through repeal of criminal laws and analyzing various forms of overcriminalization); Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005) (describing symposium exploring overcriminalization); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) (describing criminal law as a “one-way ratchet that makes an ever larger slice of the population felons”).

² See generally, e.g., Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) (empirically documenting the causes of wrongful convictions); *Exonerating the Innocent*, INNOCENCE PROJECT, <http://www.innocenceproject.org/free-innocent/exonerating-the-innocent> (last visited Feb. 11, 2016) (showing 336 U.S. exonerations based on DNA evidence as of December 2015).

³ See generally, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (arguing that race discrimination is now largely expressed through mass incarceration and documenting the crisis); Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. L. REV. 477 (2009) (documenting the effects of mass incarceration and critiquing the flawed justifications for its use).

⁴ See Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 501 (2012) (noting that “in the last several years, national pretrial detention rates have increased significantly”).

⁵ See MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., *PRETRIAL DETENTION AND CASE OUTCOMES, PART 1: NONFELONY CASES* 25 (2007), http://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=669&doc_name=doc (describing the length of pretrial detention as one of the most important factors determining the likelihood of conviction); Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344, 1355 n.44 (2014) (describing this phenomenon and collecting sources).

⁶ Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2492–93 (2004).

dencies.⁷ Detained defendants are more likely to lose their jobs and housing during pretrial detention, and society loses tax revenue while paying the costs of constructing and operating jails. When breadwinners are in jail awaiting trial, families have less support, increasing the burden on public assistance programs.⁸ But despite the widespread adoption of statutes creating a presumption in favor of pretrial release, detention is commonplace.⁹

Bail historically received wide scholarly attention,¹⁰ but this attention waned in the aftermath of *United States v. Salerno*,¹¹ which rejected constitutional challenges to a federal law authorizing pretrial detention for dangerousness.¹² Recently, a handful of scholars have rejuvenated the debate, focusing on the continuing problems of the pretrial system and the legal avenues for addressing them left open by *Salerno*. One strand of this debate focuses on the problems with judicial assessments of dangerousness and proposes that judges use measures that are more objective in pretrial release determinations.¹³

7 See, e.g., Arthur R. Angel et al., *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 300, 352 (1971) (“The indelible impact of this incarceration, the exposure to those whose way of life is crime and to persons who have lost all hope and are resigned to failure, leave many defendants hardened, embittered, and more likely to recidivate once released, than they were before incarceration.” (footnotes omitted)); Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1320–21, 1363 (2012) (discussing harmful effects of pretrial detention); Richard C. McCorkle, *Personal Precautions to Violence in Prison*, 19 CRIM. JUST. & BEHAV. 160, 165 (1992) (discussing criminogenic effects in the form of aggressive precautionary behavior).

8 See Wiseman, *supra* note 5, at 1356–57 (describing the economic effects of pretrial detention and providing additional sources).

9 See Marie VanNostrand et al., *Pretrial Risk Assessment in the Federal Court*, FED. PROB., Sept. 2009, at 3, 5 (noting that, in federal courts, pretrial detention increased from “53 percent of persons charged with a federal offense to 64 percent” between 2001 and 2007, but that some of this increase is due to judges classifying defendants as falling within higher risk levels).

10 See generally, e.g., ARTHUR LAWTON BEELEY, *THE BAIL SYSTEM IN CHICAGO* (1927) (noting disparate effects of bail on poor defendants, corrupt practices of bail bondsmen, and other problems); MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 199–241 (1979) (identifying the consequences of pretrial detention and its implications for a defendant’s “journeys through the court”); JOHN S. GOLDKAMP, *TWO CLASSES OF ACCUSED: A STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE* 21–22 (1979) (describing how bail disparately impacts indigent defendants); Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 995–96 (1965); Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641, 643 (1964) (describing how pretrial detention leads to a higher likelihood of conviction and has other negative impacts on defendants and on society).

11 *United States v. Salerno*, 481 U.S. 739 (1987).

12 *Id.* at 755 (affirming the constitutionality of the Bail Reform Act).

13 See Baradaran & McIntyre, *supra* note 4, at 554 (proposing that judges use an empirical model that better predicts dangerousness); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 1–2, 62 (2003) (noting problems with clinical predictions of dan-

These scholars note the superior accuracy of statistics-based actuarial models that use numbers, not subjective impressions, to assess likely dangerousness, and observe that more defendants would be released pretrial if judges employed these models.¹⁴ Flight risk—the other chief factor in bail decisionmaking—has been largely ignored, however.¹⁵ More broadly, directing judges to consider actuarial models would help, but experience with judicial discretion suggests that it will not achieve the intended results.¹⁶ Federal judges already receive information from actuarial models for about one-sixth of federal defendants in pretrial hearings,¹⁷ but they retain discretion to consider subjective factors when making pretrial release decisions.¹⁸ Accordingly, the number of federal defendants detained pretrial remains unnecessarily high; as former Attorney General Eric Holder noted, “Many of these individuals are nonviolent, non-felony offenders . . . [a]nd a disproportionate number of them are poor. They are forced to remain in custody—for an average of two weeks, and at considerable expense to taxpayers—because they simply cannot afford to post the bail required.”¹⁹

gerousness in a variety of contexts, including pretrial, and suggesting standards that would require closer scrutiny of these determinations); Elyce H. Zenoff, *Controlling the Dangers of Dangerousness: The ABA Standards and Beyond*, 53 GEO. WASH. L. REV. 562, 592–93 (1985) (noting problems in predicting pretrial dangerousness).

¹⁴ See *supra* note 13; *infra* note 140 and accompanying text (summarizing the literature on the accuracy of actuarial models used in pretrial detention).

¹⁵ But see *infra* note 140; CYNTHIA A. MAMALIAN, PRETRIAL JUSTICE INSTITUTE, STATE OF THE SCIENCE OF PRETRIAL RISK ASSESSMENT 22 (2011), [http://www.pretrial.org/download/risk-assessment/PJI%20State%20of%20the%20Science%20Pretrial%20Risk%20Assessment%20\(2011\).pdf](http://www.pretrial.org/download/risk-assessment/PJI%20State%20of%20the%20Science%20Pretrial%20Risk%20Assessment%20(2011).pdf) (arguing that financial conditions should be set based on individualized determination of, inter alia, flight risk, rather than through the use of fixed “money bail schedules”); Am. Bar Ass’n, Criminal Justice Section Standards, Pretrial Release Standard 10-5.3(e), AM. BAR ASS’N, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html (last visited Feb. 23, 2016) (same).

¹⁶ Timothy P. Cadigan & Christopher T. Lowenkamp, *Implementing Risk Assessment in the Federal Pretrial Services System*, FED. PROB., Sept. 2011, at 30, 33 (finding that in order for judges’ reliance on actuarial tools to effectively reduce pretrial detention, “magistrate judges [would have to] assume a higher level of risk in selecting defendants for release than they had been willing to assume in the past five years”).

¹⁷ *Id.* at 33 (“The federal system averages about 26,000 pretrial investigations and reports per quarter. Unfortunately, the [Pretrial Services Risk Assessment tool (“PTRA”)] is averaging about 4,000 per quarter, leaving 22,000 reports without PTRA scores.”).

¹⁸ See *id.* at 32 (noting that when preparing a pretrial report for the magistrate judge, a pretrial services officer may present a recommendation different from the one calculated by the PTRA after consulting with his or her supervisor).

¹⁹ Eric Holder, Att’y Gen., U.S. Dep’t of Justice, Address at the National Symposium on Pretrial Justice (June 1, 2011), <http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110601.html>.

The explanation for this lies, at least in part, in judges' skewed incentives—there is a significant principal-agent problem that must be addressed if we are to fix the bail system. As an initial matter, trial judges are notoriously busy and may have only a few minutes to devote to each bail decision, thus making it unlikely that they will glean the facts necessary to fully and accurately assess dangerousness and flight risk.²⁰ Worse, they have reason to err on the side of detention. Judges are far more likely to detain or set a high bail requirement than one might expect from the text of the statutes passed²¹ by their legislative principals²² because their incentives substantially diverge from those of the legislature. Judges, particularly elected judges, are wary of bearing public responsibility for crimes that go unpunished—and new crimes that are committed—because of an erroneous decision to release defendants prior to trial.²³ Erroneous decisions to detain, on the other hand, produce no similar negative reputational consequences. Elected judges, too, may face pressure from a locally powerful bail lobby.²⁴ While legislatures, of course, face pressure to be “tough on crime,”²⁵ they are also subject to growing demands from across the political spectrum to control the high costs of detention.²⁶ Unlike legislatures, however, judges do not internalize

²⁰ See, e.g., Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1755 (2002) (noting that in Baltimore City courts pretrial release hearings “took slightly more time when an attorney was present: on average, two minutes and thirty-seven seconds, versus one minute, forty-seven seconds without counsel”).

²¹ See *infra* notes 129–31 and accompanying text (describing federal and state statutes that statutorily presume that judges should release defendants pretrial).

²² More accurately stated, the “public,” not the legislature, is the principal. The judiciary is a separate and co-equal branch of government; however, because legislatures write the bail statutes that judges help implement, this Article uses the term “legislative” or “legislature” to refer to the principal for convenience.

²³ See Keith Swisher, *Pro-Prosecution Judges: “Tough on Crime,” Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 364 (2010) (“While it is impossible to predict who will commit a crime while released on bail, it is easy for politicians in hindsight to criticize a judge who granted bail to the defendant who re-offends while out on bail.”) (quoting Jeannine Bell, *The Politics of Crime and the Threat to Judicial Independence*, in JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY App. F, 3 (2003)).

²⁴ See Wiseman, *supra* note 5, at 1398–99.

²⁵ Jack F. Williams, *Process and Prediction: A Return to a Fuzzy Model of Pretrial Detention*, 79 MINN. L. REV. 325, 326 (1994) (“Pretrial detention is politically popular because it symbolizes a government tough on crime.”); cf. *In re Watson*, 794 N.E.2d 1, 3 (N.Y. 2003) (per curiam) (describing a judge’s campaign comments regarding the need to use bail to “gain a reputation for being tough” and to “make it very unattractive for a person to be committing a crime”).

²⁶ See, e.g., CRIMINAL JUSTICE SECTION, AM. BAR ASS’N, STATE POLICY IMPLEMENTATION

any of the costs of pretrial detention,²⁷ nor do they receive rewards for correctly releasing defendants pretrial.²⁸ Thus, even when presented with objective, actuarial models to guide their discretion, they detain far more defendants than is necessary to constrain dangerousness and flight risk.²⁹

Agency costs,³⁰ then, are at the heart of the problems with pretrial justice, and reducing them must be part of the solution. These costs are the result of the heavy reliance on judicial discretion in pretrial release determinations.³¹ In the past, this reliance was justifiable due to the lack of workable alternatives.³² But modern experience with actuarial models in a variety of contexts strongly suggests that we can create statistical models that do a better job of predicting violence and flight than judges' subjective impressions.³³ In Kentucky, where pretrial services agencies use actuarial models to assess defendants' likely dangerousness and flight risk and make recommendations to

PROJECT 2 (2011), http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_handouts.authcheckdam.pdf (proposing pretrial release reforms that would save states money); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1308 (2005) (observing that "states' relatively greater concern with incarceration costs is more likely to add an element of reflection to the political debate."); Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1975 (2005) ("Governments face substantial costs in detaining prisoners that are as or more costly than the incarceration of convicted criminals for the same period of time. In theory, these costs may exert a modicum of pressure on the federal and state legislatures to change bail hearing rules to limit the use of pretrial detention." (footnote omitted)).

²⁷ Eric Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1703 (1996) ("Because judges enjoy more independence than do legislators, they feel less pressure than legislators to choose rules on the basis of their distributive effects."); see also Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the Interests of Finality*, 2013 UTAH L. REV. 561, 612–13 ("Because the judiciary does not internalize the costs of incarceration . . . judges may focus excessively on whether the defendant deserves a particular punishment without considering whether the benefit to society of the defendant's incarceration is worth the financial cost of a lengthy sentence."); Manns, *supra* note 26, at 1975 ("But prosecutors and judges face little if any accountability for the costs of maintaining pretrial detention facilities and prisons.").

²⁸ Cf. Manns, *supra* note 26, at 1975.

²⁹ See Baradaran & McIntyre, *supra* note 4, at 553–54 (noting that by using an actuarial model tested by the authors, which would provide information to judges about defendants' likely dangerousness, a much larger proportion of defendants could be released—from 72,000 annually to 99,882 annually—while "pretrial violent-crime rates would decrease from 1.9% to 1.24%, which is a significant improvement.").

³⁰ See generally Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (analyzing the nature of agency costs and their relationship to the ownership structure of a firm).

³¹ See Baradaran & McIntyre, *supra* note 4, at 553–54.

³² See *supra* notes 10–15 and accompanying text.

³³ See, e.g., Baradaran & McIntyre, *supra* note 4, at 553.

which judges must give “due consideration,”³⁴ there has been a “5% increase in the overall release rate,” while trial “appearance and public safety rates have remained consistent.”³⁵

Washington, D.C., which uses a similar model, has also achieved strong results,³⁶ and more cities, counties, and states around the country are starting to deploy actuarial models pretrial.³⁷ Providing judges with better information and displacing certain clinical judgments with actuarial determinations is a good start, but it leaves the judges’ incentives largely unchanged.³⁸ Judges still retain full discretion to detain the defendant. Thus, absent extraordinary circumstances, these models’ recommendations should be binding to limit judicial discretion and minimize the potential for agency costs.

So far, while it has acknowledged the existence of the incentives pushing judges towards denying release or setting a high bond requirement, the literature has focused very little on the discretion that allows judges to act on them. Scholars have long argued that judges must more accurately assess dangerousness for reasons of constitutionality, predictability, and fairness. Professor Laura Appleman has accordingly suggested the use of a “bail jury” to advise judges in making pretrial decisions;³⁹ Professor Shima Baradaran would require far more substantial proof of flight risk or a risk of a threat to witnesses in order to detain defendants pretrial;⁴⁰ and Professors Baradaran and Frank McIntyre have empirically explored criteria that would more accurately predict defendant dangerousness, suggesting that counties implement a “jurisdiction-specific model” for predicting dangerousness that incorporates these criteria.⁴¹

Yet all of these models would leave judges with a large amount of discretion. Existing proposals suggest ways of better guiding judges’

³⁴ KY. R. CRIM. P. 4.10 (“In the exercise of such discretion the court shall give due consideration to recommendations of the local pretrial services agency when made as authorized by order of the Supreme Court.”).

³⁵ ARTHUR W. PEPIN, CONFERENCE OF STATE COURT ADM’RS, 2012–2013 POLICY PAPER: EVIDENCE-BASED PRETRIAL RELEASE 8–9 (2013), <http://www.pretrial.org/download/policy-statements/Evidence%20Based%20Pre-Trial%20Release%20-%20COSCA%202012.pdf>.

³⁶ *Id.* at 7 (showing that release rates rose from eleven to eighty percent and that appearance rates were at eighty-eight percent).

³⁷ See *infra* text accompanying notes 241–42.

³⁸ See *supra* notes 27–29 and accompanying text.

³⁹ Appleman, *supra* note 7, at 1363–66.

⁴⁰ Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 766–75 (2011) (arguing that defendants have a due process right to be released pretrial absent proof of “substantial risk” that the defendant will threaten witnesses or flee).

⁴¹ Baradaran & McIntyre, *supra* note 4, at 532, 554–55.

bail decisions, but none seem to envision significantly limiting judicial discretion to reduce agency costs.⁴² This Article takes up that project.

Part I of this Article provides an account of the principal-agent problem in bail, arguing that judges' incentives push them to impose higher bail requirements and detain more defendants than is necessary to achieve the objectives of their legislative principals. Part II argues that these agency costs can be dramatically reduced—and the quality of pretrial release determinations significantly improved—by moving from the current system, in which judges have broad discretion to assess each defendant's likelihood of flight risk and dangerousness, to an actuarial model, in which decisions are made on the basis of statistically validated risk assessment tools. It also explores the limited, existing use of actuarial models in pretrial decisionmaking and the small but growing scholarship on the promise of actuarial approaches in bail determinations. Part III focuses on a stronger approach, proposing the adoption of mandatory "bail guidelines" to determine whether defendants should be released, released with conditions, or detained pretrial, and offers some thoughts on how they should be developed and implemented. Bail commissions appointed by state legislatures and by Congress could write and revise these guidelines, as flexibility and improvement of the guidelines based on lessons learned will be necessary. This proposal builds from the useful, if imperfect, model of the United States Sentencing Commission and the Sentencing Guidelines. Part III also explores and rebuts the likely objections to the use of bail guidelines, many of which emanate from the extensive problems encountered with the Sentencing Guidelines.

Mandatory bail guidelines will not be a panacea, but constructing a theoretical basis for their use and beginning to explore their operationalization will bring us closer to fixing the bail system.

42 Professors Marc Miller and Martin Guggenheim have come closer to suggesting a less discretionary model, arguing that "[j]udges should only use prediction to distribute punishment or guide decision-making within otherwise justified ranges." Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 379–80 (1990); see also Marc Miller & Norval Morris, *Predictions of Dangerousness: Ethical Concerns and Proposed Limits*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 393, 402–03, 434–35 (1986) (in the sentencing context, defining dangerousness as "intentional behavior that is physically dangerous to the person or threatens a person or persons other than the perpetrator" and proposing specific factors that should be included within dangerousness determinations, including the act and prior record).

I. THE PRINCIPAL-AGENT PROBLEM IN BAIL DETERMINATIONS

As described above,⁴³ widespread pretrial detention imposes significant costs on defendants and society, and legislators who set pretrial policy are increasingly aware of them.⁴⁴ A determination of dangerousness or flight risk, including an inaccurate “false positive,” often leads to the jailing of the defendant pretrial, which in turn causes the loss of jobs and housing, and has criminogenic effects—turning once nondangerous defendants into seasoned criminals.⁴⁵ And erroneous release decisions, albeit presumably rarer for reasons discussed below, allow criminals to escape justice and put the community at risk.

Judges weigh these costs against the need to keep defendants from absconding or committing crimes while awaiting trial (and, perhaps, the need to be perceived as “tough on crime”).⁴⁶ The language of typical bail statutes seemingly reflects a reasonable balance. The influential federal Bail Reform Act,⁴⁷ for example, directs judges to release pretrial detainees on personal recognizance, or with an unsecured monetary bond, “unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.”⁴⁸ Despite legislative treatment of pretrial release as a default, and requirements that judges make certain findings when departing from this default,⁴⁹ pretrial detention rates are high,⁵⁰ and have risen steadily,⁵¹ dipping only slightly when a recession drew at-

⁴³ See *supra* notes 7–8 and accompanying text.

⁴⁴ See Barkow, *supra* note 26, at 1278 (noting that in the sentencing context, despite universal pressures on state legislatures to be “tough on crime,” some states have reduced sentences and that these states have acted due to “greater attention to incarceration costs”).

⁴⁵ For detailed discussions of the problems with pretrial detention, including job loss, difficulty locating and communicating with attorneys, higher likelihood of conviction as compared to defendants released (controlling for the nature of the charge), and criminogenic effects, among others, see Appleman, *supra* note 7, at 1301, 1318–21; Stephanos Bibas, *supra* note 6, at 2493; Douglas J. Klein, Note, *The Pretrial Detention “Crisis”: The Causes and the Cure*, 52 WASH. U. J. URB. & CONTEMP. L. 281, 293–97 (1997); Miller & Guggenheim, *supra* note 42, at 424; Wiseman, *supra* note 5, at 1353–54.

⁴⁶ See, e.g., Williams, *supra* note 25, at 330–31.

⁴⁷ Bail Reform Act of 1984, 18 U.S.C. §§ 3141–3150 (2012).

⁴⁸ *Id.* § 3142(b).

⁴⁹ See, e.g., *id.*; *infra* note 131.

⁵⁰ Marie VanNostrand & Gena Keebler, *Our Journey Toward Pretrial Justice*, FED. PROB., Sept. 2007, at 20, 23 (noting that during 2006, courts reported release rates of forty-seven percent in federal courts (when immigration cases are excluded) and thirty-eight percent in state courts).

⁵¹ See *id.* at 23 (“An analysis of the jail populations for the 10 years between 1996 and 2005 reveals an increase in the percent of the population awaiting trial from 51% in 1996 to 62% in

tention to the expense of jails.⁵² The explanation for this lies, at least in part, in the broad discretion that judges exercise when setting bail,⁵³ and the divergence of their incentives from those of legislatures.⁵⁴

A rich literature has explored how actors—be they corporations or Congress⁵⁵—might best achieve their goals when the actors lack the requisite expertise or resources to attain their goals, or when reaching those goals independently would be too costly.⁵⁶ In these circumstances, the entity (the “principal”) often employs an agent to accomplish its goal, and this decision involves trade-offs: although it allows the principal to achieve a result that it could not efficiently reach itself, the agency choice imposes new agency costs.⁵⁷ These include monitoring costs incurred to align the agent’s actions with the principal’s goals, bonding costs that make the principal at least partially whole if the agent fails to act in accordance with the principal’s goals, and residual costs, which are the costs incurred when the agent follows its own incentives rather than the principal’s, and which cannot be avoided through monitoring or offset through bonding.⁵⁸ When, as in the bail context, agents’ incentives and actions diverge from the principals’ goals to an unacceptable degree, agency costs—the negative results of relying on agents to carry out the principal’s will⁵⁹—are high.

2005 . . .”); THOMAS H. COHEN, U.S. DEP’T OF JUSTICE, PRETRIAL DETENTION AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 1995–2010 1 (2013), <http://www.bjs.gov/content/pub/pdf/pdmfde9510.pdf> (“The percentage of drug defendants detained pretrial increased from 76% in 1995 to 84% in 2010.”).

⁵² See COHEN, *supra* note 51, at 3 (“The percentage of immigration defendants detained pretrial increased from 86% in 1995 to 98% in 2008, before declining to 88% in 2010.”); Wiseman, *supra* note 5, at 1400.

⁵³ See *infra* notes 130–34 and accompanying text.

⁵⁴ See *infra* Part I.

⁵⁵ See D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 706 (2013) (noting that in the context of Congress acting as the agent of the electorate, “the structure of the agency problem in the political process looks remarkably similar to the agency problem in public corporations” because “[b]oth involve elected agents acting on behalf of diffuse principals who face substantial collective action problems in monitoring agents and imposing their will”).

⁵⁶ See Rachel E. Barkow & Kathleen M. O’Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1989 (2006) (noting that in the sentencing context, “having the legislature enact legislation that specifies how each case is to be sentenced . . . is not practicable because of resource constraints”).

⁵⁷ See, e.g., Jensen & Meckling, *supra* note 30, at 308–10.

⁵⁸ See Kenneth G. Dau-Schmidt, *An Agency Cost Analysis of the Sentencing Reform Act: Recalling the Virtues of Delegating Complex Decisions*, 25 U.C. DAVIS L. REV. 659, 663 (1992).

⁵⁹ See Rave, *supra* note 55, at 694 (noting that “[a]gents may not work as hard to forward the principal’s interests as the principal would, or worse, agents may pursue their own interests at the principal’s expense” and describing these costs, as well as the costs of monitoring agents to attempt to align agent-principal goals, as agency costs).

Judges, who often have only a few minutes to devote to each pretrial release decision,⁶⁰ are far more likely than legislators (who wrote the bail statute) to bear blame for releasing a defendant who flees justice or commits a violent crime while on bail.⁶¹ And judges, unlike legislative bodies, are not responsible for increased jail budgets, lost tax revenues, and drains on social services resulting, directly or indirectly, from their decisions.⁶² This misalignment of incentives produces agency costs.

This Part explores how judges, acting independently, are unlikely to carry out the will of legislatures and how existing solutions to reduce agency costs—through monitoring of judges by attorneys or constitutional and statutory challenges to judicial bail decisions—are unlikely to be successful, laying the groundwork for the rules-based approach explored in Parts II and III.

A. *Judges as Independent Agents*

When the incentives of the agent and principal are nearly perfectly aligned, then the principal might be able to appoint an agent without incurring any of these costs.⁶³ The agent will merely carry out the will of the principal for a small amount of compensation or similar reward.⁶⁴ In the context of pretrial release determinations, however, the alignment between the incentives of judges and legislatures is far from perfect.

1. *Judges' Incentives to Deny Pretrial Release*

A judge receives few rewards for correctly releasing a defendant pretrial: even if the defendant appears at all required hearings and does not commit any crimes while awaiting a determination of guilt, the judge gets only the quiet satisfaction of a job well done. In contrast, there is a significant risk of public scorn if a released defendant flees justice, or worse, commits a violent crime while on pretrial release. And the decision to detain or set an impossibly high bond for even a low-risk defendant has few downsides.⁶⁵ While no one wants to be the object of public ire, the problem is particularly acute for elected

⁶⁰ Colbert, *supra* note 20, at 1755 (describing the brief time that judges typically devote to pretrial hearings).

⁶¹ See Swisher, *supra* note 23, at 364.

⁶² See *supra* note 27.

⁶³ See Jensen & Meckling, *supra* note 30, at 308; *supra* notes 55–59 and accompanying text.

⁶⁴ See Jensen & Meckling, *supra* note 30, at 308.

⁶⁵ See Swisher, *supra* note 23, at 364.

judges, of whom there are many.⁶⁶ As one judge running for City Court office in New York stated in his campaign, the judiciary could use both bail and sentencing to “make it very unattractive for a person to be committing a crime” within the city.⁶⁷

Elected judges, too, might be subject to pressure from locally powerful bail lobbies to keep bond requirements high, increasing the number of defendants unable to make bail.⁶⁸ The success of this lobby at influencing legislatures⁶⁹—who internalize both the benefits and costs of pretrial release⁷⁰—suggests that it will be particularly powerful in the judicial context where judges typically only bear the costs of releasing defendants pretrial. Bail bondsmen consistently oppose efforts to narrow the use of money bail or otherwise expand pretrial release because it directly impacts their bottom line.⁷¹ Imposing lower limits on money bail, increasing the number of defendants who are released on recognizance, and releasing defendants to pretrial treatment programs all diminish bail bondsmen’s business—and theirs is a substantial business.⁷² Furthermore, prosecutors and law enforcement officials may, similar to judges, be subject to blame if a defendant released on their watch commits a crime pretrial.⁷³ Like judges who want to appear to be tough on all crime (including the possibility of pretrial crime), these groups are motivated to retain a similarly broad

⁶⁶ See *id.* at 365.

⁶⁷ *In re Watson*, 794 N.E.2d 1, 3 (N.Y. 2003) (per curiam) (affirming determination of misconduct and removal of judge from office). The judge also stated, “[w]e need a city court judge who will work together with our local police department to help return Lockport to the city it once was.” *Id.*

⁶⁸ Wiseman, *supra* note 5, at 1398–400.

⁶⁹ *Id.* at 1398–99 (describing successful lobbying efforts by bondsmen).

⁷⁰ See *supra* notes 27–28 and accompanying text.

⁷¹ See, e.g., Cliff Collins, *The Question of Commercial Bail: Bail Industry Wants Oregon to Return to a System It Once Rejected*, OR. ST. BAR: BULL. (Oct. 2014), <https://www.osbar.org/publications/bulletin/14oct/bailbonds.html> (“Representatives of the commercial bail bonds industry make no bones about it: They think Oregon would be better off to revert to the bail system the state ran before 1974.”); Laura Sullivan, *Bondsman Lobby Targets Pretrial Release Programs*, NAT’L PUB. RADIO, <http://www.npr.org/templates/story/story.php?storyId=122725849> (last updated Feb. 24, 2010, 1:10 PM) (“[I]ndustry experts say powerful bail lobbying groups have begun using Broward [County] as a road map of how to squash similar [pretrial services] programs elsewhere . . .”). Bondsmen have also opposed narrower measures such as providing defendants with representation in the pretrial process. See Douglas L. Colbert, *Coming Soon to a Court Near You—Convicting the Unrepresented at the Bail Stage: An Autopsy of a State High Court’s Sua Sponte Rejection of Indigent Defendants’ Right to Counsel*, 36 SETON HALL L. REV. 653, 707 n.318 (2006) (noting successful opposition by the bail bond industry to a proposed bill for counsel in pretrial hearings).

⁷² Wiseman, *supra* note 5, at 1398–99.

⁷³ See Swisher, *supra* note 23, at 368.

anti-crime stance; thus, like other interested parties, they will lobby elected judges against pretrial release.⁷⁴

2. *Judges' Failure to Internalize the Costs of Pretrial Detention*

Judges do not only err toward detaining a defendant pretrial as a result of pressures from the public, law enforcement and prosecutors, and bail bondsmen. They also fail, of course, to internalize the costs of pretrial detention⁷⁵—the money spent on building, maintaining, and operating the jails necessary to detain the millions of defendants who are not released pretrial, declining tax revenue from defendants' lost jobs and reduced productivity, and the increased burden on social services from these defendants and their families.⁷⁶ Judicial salaries depend only indirectly on other budgetary burdens, and the expense of jails is only a small piece of the many public expenses, from agricultural subsidies to public education and infrastructure, that might cause downward pressure on salaries.⁷⁷ A judge will thus not directly experience a financial penalty for detaining more defendants pretrial than is necessary to prevent pretrial crime or flight risk.

Furthermore, from the judge's perspective, each detention decision is an individual one. The judge is concerned about the likely dangerousness or flight risk of the defendant appearing before her, and likely does not regularly consider the cumulative impacts, financial or otherwise, of sending thousands of defendants to jail.⁷⁸ Resource constraints make it even more unlikely that judges will consider costs and other effects outside of the boundaries of each pretrial case. In the face of high caseloads and inadequate staffing, the judge has difficulty adequately assessing the bail factors that she must consider, let alone

⁷⁴ See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 728 (2005) ("No other group comes close to prosecutorial lobbying efforts on crime issues."); Miller & Guggenheim, *supra* note 42, at 340 ("Now, prosecutors and legislators unabashedly seek to use pretrial detention to reduce crime and protect society.").

⁷⁵ See *supra* note 27.

⁷⁶ See Wiseman, *supra* note 5, at 1356–58 (estimating the fixed and variable costs of detaining defendants pretrial and listing sources).

⁷⁷ See, e.g., Linh Vuong et al., *The Extravagance of Imprisonment Revisited*, 94 JUDICATURE 70, 70, 76–79 (2010) (surveying corrections budgets in California, Florida, New York, and Texas, and finding that these budgets ranged from two to seven percent of the states' total budgets).

⁷⁸ See 18 U.S.C. § 3142(d)(2) (2012) (emphasizing the need for "temporary detention" pending trial if a judge determines that a person "may flee or pose a danger to the community"); cf. Kim, *supra* note 27, at 611 (noting that the financial benefit of correcting a wrongful incarceration accrues only after many years have passed).

additional factors that she is not currently required to take into account.⁷⁹

Faced with strong pressure to err on the side of detaining defendants and bearing none of the costs of pretrial detention, judges are thus unlikely to act independently to accomplish legislatures' stated goals of limiting detention to very dangerous defendants or those that pose high flight risks.⁸⁰ Traditional means of changing agents' individual incentives by, for example, compensating them for successful implementation of the principal's policies or punishing them for failures,⁸¹ are also not easily deployed in the judicial context. Varying the compensation of judges appointed for life based on their individual decisions in cases might be viewed as an impermissible intrusion by Congress into the judicial branch, and, at a minimum, an inadvisable approach because it would substantially curtail judicial independence.⁸²

Judges' incentives could be somewhat altered by encouraging them to take into account the costs of detaining defendants pretrial—a simple means of attempting to change the agents' behavior.⁸³ Monitoring judicial agents by tracking individual judges' release rates, as

⁷⁹ See, e.g., Colbert, *supra* note 20, at 1755 (discussing how the appearance of counsel at bail hearings makes the defendant more likely to be released pretrial); Betsy Kushlan Wanger, Note, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 YALE L.J. 320, 325–26 (1987) (describing how the lack of mechanisms to collect and verify information for bail determinations contributed to judicial reluctance to release defendants pretrial).

⁸⁰ See 18 U.S.C. § 3142(a), (d)(2), (e)(1).

⁸¹ See Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535, 546 (2011) (“One common method for more closely aligning the agent's interests with the principal's is to compensate the agent based on outcome”); *supra* notes 57–59 and accompanying text.

⁸² Dau-Schmidt, *supra* note 58, at 667–68 (noting that analogizing traditional principal-agency relationships to congressional and judicial relationships can be difficult because “to protect federal judges in their role of sustaining individual constitutional rights against infringement by a simple majority, our Constitution protects judges from most of the means a principal might use to control an agent” and identifying “the limited opportunities for ex post reward or punishment of judges based on performance”). Varying judicial compensation could involve decreasing judicial salaries, a violation of Article III of the Constitution. U.S. CONST. art. III, § 1 (“[J]udges . . . shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

⁸³ Cf. Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 50 (2008) (proposing that information on incarceration rates should be given to prosecutors so that they can make more informed choices during charging, plea-bargaining, and dismissal, in order to remedy the issue of mass incarceration). Indeed, Professor Gershowitz describes an information-sharing approach as “requiring [] one set of government workers” to “shuffle some paperwork to another set of government workers,” an approach that pales in comparison to the massive cost of corrections. *Id.* at 79; see also *id.* at 81–83.

some jurisdictions track docket clearance rates,⁸⁴ would also be a strong step in the right direction, as it might “shame” judges into internalizing some of the societal costs created by their decisions. While judges might not be as easily incentivized by shaming as are corporations—which are motivated by profit and have sometimes been shown to react meaningfully to information disclosure, public “report cards,” and associated boycotts⁸⁵—it would likely help. However, an information disclosure and shaming approach would likely only reduce, not eliminate, the incentive disparity.⁸⁶

B. Existing Proposals

Proponents of bail reform have suggested several thoughtful and worthwhile ways of improving judicial decisionmaking. None, however, would directly address judges’ and legislatures’ conflicting incentives, and, unfortunately, few have found much traction in the policy arena.

⁸⁴ See, e.g., THE SUPREME COURT OF OHIO, eSTATS: UNDERSTANDING JUDICIAL PERFORMANCE MEASURES 1, <http://www.supremecourt.ohio.gov/JCS/casemng/eStats/judPerform-Measures.pdf> (describing “monthly caseload statistical reports submitted by judges,” which include data clearance rates based on “Total Terminations” and “total number of incoming cases”); TEX. COURTS, PERFORMANCE MEASURES 1, <http://www.txcourts.gov/media/696352/10-Performance-Measure-Definitions.pdf> (describing requirement that district courts report their backlog and number of cases disposed or added to their docket).

⁸⁵ E.g., Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 125–26, 126 nn.33–37 (2004) (summarizing benefits and limitations of the Toxic Release Inventory program, which requires polluters to annually disclose chemical releases, as a means of changing corporate behavior that has, in some cases, led to substantial reductions in the use and release of chemicals); Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 286–88 (2001) (describing certain successes of the Toxic Release Inventory program).

⁸⁶ Efforts to collect the information needed for public shaming of judges might also be hindered by inadequate availability of information. See, e.g., PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 19 (2015), <http://www.policemag.com/resources/documents/21stcpolicingtaskforce-finalreport.pdf> (emphasizing the importance of federal statistical programs to illuminate public and private decisions on crime and other issues, yet noting the scant funds allocated to statistical data collection and reporting); TODD D. MINTON & ZHEN ZENG, U.S. DEP’T OF JUSTICE, JAIL INMATES AT MIDYEAR 2014 1–9 (2015), <http://www.bjs.gov/content/pub/pdf/jim14.pdf> (providing only limited pretrial data); MARK MOTIVANS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2009 10–11 (2009), <http://www.bjs.gov/content/pub/pdf/fjs09.pdf> (same); cf. Catherine Y. Kim, *The Politics of Agency Enforcement Discretion* 15, 26–27, 40–41 (Univ. of N.C. Legal Studies, Research Paper No. 2571068), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2571068 (noting, in the administrative context, how reporting requirements “may fail to expose shifts in enforcement policy” due to inadequate reporting and data and limited responses to Freedom of Information Act requests); Karkkainen, *supra* note 85, at 287–88 (observing that the mandatory reporting program in “one of the nation’s most effective environmental laws,” reduced, but did not eliminate, toxic waste emissions).

1. *Expanding Pretrial Representation*

Some proposals would give expanded representation to defendants at the initial pretrial assessment, thus relying on lawyers to make arguments for pretrial release in each individual case.⁸⁷ Lawyers could point to the close connections of the defendant with his community and family, a strong employment record, and the lack of dangerous crimes in the defendant's history, all of which might lead the judge to set a low money bail amount (making it more likely that the defendant could afford bail) or release the defendant, with or without conditions.⁸⁸ These individual decisions would collectively lower pretrial detention rates.⁸⁹

Improving pretrial representation would likely expand release rates while also making individual decisions fairer.⁹⁰ But the costs of this approach are high, and with public defenders already stretched thin representing clients at the trial and plea bargaining stages, pretrial representation does not appear to be a priority.⁹¹ Rough estimates of total indigent defense expenditures in the United States in 2008 reached more than \$5 billion.⁹² Budgetary cutbacks during the recession affected existing indigent defense programs for defendants in the plea bargaining and trial stages,⁹³ and the feasibility of adding new programs for pretrial defendants seems particularly unlikely in this fiscal and political climate, where bail bondsmen and other lobbyists have expressly opposed even modest efforts to expand pretrial

⁸⁷ See, e.g., Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 411–12, 428 (2011).

⁸⁸ See 18 U.S.C. § 3142 (2012); Colbert, *supra* note 20, at 1725–26 (“The [Supreme] Court went so far as to recognize a lawyer’s influence in the outcome of a pretrial release bail determination . . .”).

⁸⁹ See Colbert, *supra* note 20, at 1725–26.

⁹⁰ Colbert, *supra* note 87, at 342, 411 (“[C]ounsel’s presence [at pretrial hearings] enhances the fairness and efficiency of state criminal proceedings,” and “[t]imely legal representation reinforces the long-cherished principle of equal justice and presumption of innocence”).

⁹¹ See *id.* at 410–11 (“Some states and localities justify denying a defendant assigned counsel [for pretrial hearings] by arguing that it is too costly.”).

⁹² HOLLY R. STEVENS ET AL., CTR. FOR JUSTICE, LAW & SOC’Y AT GEORGE MASON UNIV., STATE, COUNTY AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008 72 (2010), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf. This number includes both criminal and some civil indigent defense expenditures. *Id.* at 3.

⁹³ Margaret A. Costello, *Fulfilling the Unfulfilled Promise of Gideon: Litigation as a Viable Strategic Tool*, 99 IOWA L. REV. 1951, 1956–57 (2014) (“In recent years, the economy and fiscal position of state and local governments has affected funding for indigent defense.”).

representation.⁹⁴ Providing money directly to defendants to hire their own attorney pretrial would face the same fiscal barrier.⁹⁵

2. *Eliminating Money Bail*

Scholars have long called for Congress and state legislatures to eliminate the use of money bail because the primary driver of unnecessary pretrial detention is unaffordable bail—judges set amounts tied to the crime committed, not to the defendant’s ability to pay.⁹⁶ The majority of defendants awaiting trial in jail are detained because they could not afford the bail set for them, not because they were found to be dangerous or have a particularly high flight risk.⁹⁷ This practice is deeply inequitable: wealthy criminal defendants benefit from pretrial release (and the lower likelihood of conviction associated with this release), while poor defendants are detained.⁹⁸

Nonetheless, repeated calls for the elimination of money bail or, more modestly, for narrowing its use and introducing alternatives such as pretrial services programs, have met stiff, often successful resistance⁹⁹ from the powerful bail bondsman lobby.¹⁰⁰ As introduced in Part I.A.2, bail bondsmen are a highly organized interest group that may have disproportionate influence from the perspective of regulatory capture.¹⁰¹ They have much to lose if bail is eliminated, whereas

⁹⁴ See *supra* notes 68–74 and accompanying text. Bondsmen have also opposed narrower measures such as providing defendants with counsel in the pretrial process. See Colbert, *supra* note 71, at 707 n.318.

⁹⁵ Miller & Guggenheim, *supra* note 42, at 412 (“Another way to increase the burden [on the government] of [unnecessary] detention would be to pay detainees an amount sufficient to hire a private attorney,” although “[p]olitical support for this idea would undoubtedly be hard to obtain.”).

⁹⁶ RONALD GOLDFARB, JAILS: THE ULTIMATE GHETTO 33–50 (1975) (criticizing the disproportionate effects of money bail on poor defendants); Foote, *supra* note 10, at 995–96 (noting that the majority of defendants cannot make the “average” bail); see also John N. Mitchell, Att’y Gen., U.S. Dep’t of Justice, Address at the 92nd Annual Meeting of the American Bar Association 10 (Aug. 13, 1969), <http://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/08-13-1969a.pdf> (criticizing money bail as making “an accused’s pretrial freedom depend[ant] upon his bank account”).

⁹⁷ THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1 (2007), <http://www.bjs.gov/content/pub/pdf/prfdsc.pdf> (noting that in state courts, five out of six defendants who are jailed pretrial are detained because they could not afford bail).

⁹⁸ See Rankin, *supra* note 10, at 643; *supra* note 96.

⁹⁹ See *supra* note 71; see also Wanger, *supra* note 79, at 330–35 (noting the lack of success of pretrial services proposals, despite their proven effectiveness).

¹⁰⁰ See *supra* Section I.A.1. Groups opposing money bail have begun to have more success in courts, however. See *infra* note 118.

¹⁰¹ “Capture describes situations where organized interest groups successfully act to vindicate their goals through government policy at the expense of the public interest.” Michael A.

each individual member of the disorganized public has less at stake: the incremental cost of building and operating jails, and the small, difficult-to-discern chance that the individual will be charged with a crime and then jailed pretrial.¹⁰² In the sentencing context, scholars have noted that some minority groups disproportionately impacted by “tough on crime” policies have begun to organize, but the impediments these groups face in the political process remain high.¹⁰³

3. *Reinvigorating Statutory and Constitutional Rights*

Although there has been little recent focus on bail in the criminal justice literature, a recent movement to reinvigorate pretrial defendants’ bail rights has grown as scholars have noted the injustices of jailing defendants based on their ability to pay and on hastily made, seemingly arbitrary decisions about dangerousness.

Professor Jack Williams argues that just as prosecutors must establish culpability by clear and convincing evidence to deny pretrial release under the Bail Reform Act, the same standard should apply to proving dangerousness pretrial, and judges should never presume the dangerousness of a defendant no matter the charges against him.¹⁰⁴ Professor Williams would also shift judges’ focus from dangerousness alone to a consideration of “whether there are sufficient release conditions to assure community safety.”¹⁰⁵ Professors Marc Miller and Martin Guggenheim similarly argue that due process in the pretrial setting “requires an increased use” of “incapacitative alternatives” to

Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1340 (2013). For broader definitions of capture, see *infra* note 374. The influence of the bail bondsmen lobby also affects the proposed solution in this Article, as bondsmen are likely to lobby against any legislative proposal to create bail commissions. See *supra* notes 69–72 and accompanying text. As discussed further in Part III.A, including at least one representative from this powerful interest group on the commission could help to address these concerns.

¹⁰² See Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CALIF. L. REV. 1, 9 n.26 (1991) (“Due to the information costs to interest groups of discerning how over-harsh sentences might affect them, and the organization costs of finding those with similar interests, legislatures would typically not face interest group pressure for restrained sentences, and hence are unlikely to enact more moderate sentencing laws.”).

¹⁰³ See Barkow, *supra* note 26, at 1282. But see *id.* at 1282 n.25 (noting the public’s weak voice in the sentencing policy process but suggesting that “[t]his may change” because “politicians from districts with large African American populations are facing increasing pressure to repeal or amend some of these [‘tough on crime’] laws”).

¹⁰⁴ Williams, *supra* note 25, at 386–88. “The [Bail Reform Act] contemplates three decisions in the detention process and embodies several standards of proof.” *Id.* at 380. These three decisions are: (1) a culpability determination, (2) a dangerousness determination, and (3) a detention determination. *Id.* at 380–81.

¹⁰⁵ Williams, *supra* note 25, at 388.

pretrial detention,¹⁰⁶ and Professor Laura Appleman, focusing on the need for Sixth Amendment protections pretrial, would introduce more procedural requirements to better assess defendants' dangerousness and flight risk, including a "bail jury" comprised of community members.¹⁰⁷ Professor Shima Baradaran, who has written extensively on defendants' pretrial due process rights and the problems with predicting dangerousness pretrial, proposes that "judges should not 'weigh' any of the evidence alleged against defendants before trial"¹⁰⁸ and that "defendants should maintain pretrial liberty before trial unless there is a proper basis" for detention such as safeguarding witnesses from threats by the defendant.¹⁰⁹ And in previous work, I have made a statutory and constitutional case for a right to electronic monitoring pretrial for nondangerous defendants.¹¹⁰

4. *Judicial Application of Actuarial Models Pretrial*

Several scholars and organizations have advocated for use of models similar to those that this Article proposes as part of bail guidelines. All, however, would rely on more judicial discretion in applying the models, thus failing to fully address the principal-agent problem. As introduced above, Professors Baradaran and McIntyre developed and tested an empirical model for better predicting dangerousness (not flight risk) pretrial, and showed that the use of their model would lower pretrial detention.¹¹¹ They accordingly propose that judges deploy this model.¹¹² The American Bar Association¹¹³ and National Institute of Justice¹¹⁴ also specifically recommend that judges rely on

¹⁰⁶ Miller & Guggenheim, *supra* note 42, at 423–24.

¹⁰⁷ Appleman, *supra* note 7, at 1363–66.

¹⁰⁸ Baradaran, *supra* note 40, at 772.

¹⁰⁹ *Id.* at 768.

¹¹⁰ See Wiseman, *supra* note 5, at 1383–96.

¹¹¹ Baradaran & McIntyre, *supra* note 4, at 524–56.

¹¹² *Id.*

¹¹³ AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-1.10, at 5 (3d ed. 2007), http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html ("Every jurisdiction should establish a pretrial services agency or program to collect and present the necessary information, present risk assessments, and, consistent with court policy, make release recommendations required by the judicial officer in making release decisions . . .").

¹¹⁴ BARRY MAHONEY ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, NCJ 181939, PRETRIAL SERVICES PROGRAMS: RESPONSIBILITIES AND POTENTIAL 63, 65 (2001), <https://www.ncjrs.gov/pdffiles1/nij/181939.pdf> (noting that "[s]tatutes often list factors that judicial officers should take into consideration in establishing conditions of release, but the weight to be given to information concerning potentially relevant factors is within the judicial officers' discretion," a practice that has been criticized because "[d]ifferent judicial officers, faced with the same set of

actuarial models in making bail determinations and release defendants projected to be low-risk by pretrial services programs.¹¹⁵ The National Association of Pretrial Services Agencies makes a similar recommendation.¹¹⁶ And the Pretrial Justice Institute recommends that a pretrial services entity run risk assessments for all “defendants in custody awaiting the initial appearance in court” and, periodically, for the pretrial detainee population.¹¹⁷

All of these proposals would likely produce significant positive change, but so far—with some important exceptions discussed in Part II and limited litigation successes that have generated some reform¹¹⁸—courts and legislatures have been slow to adopt them.¹¹⁹

With crime rates at their lowest point in decades and the continuing budgetary fallout from the Great Recession, however, there has been increasing interest in legislative reform.¹²⁰ While sweeping legis-

facts, often come to widely different decisions about release conditions,” and calling for “well crafted and effectively implemented” delegated release).

¹¹⁵ See *id.* at 57–58; AMERICAN BAR ASSOCIATION, *supra* note 113, at 1 (“The law favors the release of defendants pending adjudication of charges.”).

¹¹⁶ NAT’L ASS’N OF PRETRIAL SERVS. AGENCIES, STANDARDS ON PRETRIAL RELEASE 13 (3d ed. 2004), <http://www.pretrial.org/download/performance-measures/napsa%20standards%202004.pdf> (providing that “[e]very jurisdiction should have the services of a pretrial services agency” and that the agency “should provide information to assist the court in making release/detention decisions,” among other roles).

¹¹⁷ *Pretrial Risk Assessment*, PRETRIAL JUST. INST., <http://www.pretrial.org/solutions/risk-assessment/> (last visited Feb. 13, 2016).

¹¹⁸ See *Ending the American Money Bail System*, EQUAL JUST. UNDER L., <http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-money-bail-system/> (last visited Feb. 13, 2016) (“Since the beginning of 2015, Equal Justice Under Law has filed nine class action challenges to money bail systems in seven states. So far, as a result of our lawsuits, cities in Alabama, Missouri, Mississippi, and Louisiana have reformed their practices to end the use of secured money bail for new arrestees.”). Although these cases have not consistently led to the adoption of actuarial recommendations pretrial, they have tended to eliminate the use of bail schedules, which is an improvement from extensive pretrial detention caused by the inability of defendants to pay bail amounts. See *id.*

¹¹⁹ See, e.g., Wiseman, *supra* note 5, at 1400–02.

¹²⁰ CRIMINAL JUSTICE SECTION, AM. BAR ASS’N, *supra* note 26 at 2 (proposing pretrial release reforms that would save states money). Legislatures might also be willing to make reforms for reasons of pure political economy (e.g., limiting the discretion of judges to detain defendants pretrial if those judges represent the goals of an opposing political party) while publicly citing public interest purposes, such as fiscal reform. In the sentencing context, legislatures that have reduced sentencing discretion have sometimes pointed to fiscal concerns, although it is unclear whether these concerns were in fact their primary motivating factor. See Barkow & O’Neill, *supra* note 56, at 2009 (“[C]ausation may be running from the adoption of the sentencing institution to the decline in incarceration and the decline in growth rates of corrections as a percentage of expenditures, and not the other way around.”); Dhammika Dharmapala et al., *Legislatures, Judges, and Parole Boards: The Allocation of Discretion Under Indeterminate Sentencing*, 62 FLA. L. REV. 1037, 1054–55 (2010) (noting states’ introduction of indeterminate sen-

relative change—such as eliminating money bail and monitoring released defendants through pretrial services agencies—is unlikely,¹²¹ some change may be possible. To seize this opportunity, if indeed it exists, any attempt to fix the bail system should address the agency costs described here.¹²² Legislatures have already attempted to expand pretrial release by making release a default and listing factors that judges should consider to assess the likelihood of dangerousness and flight,¹²³ but for the reasons discussed above, judges have not followed these directives.¹²⁴ The next wave of bail reform should aim not at guiding judges' discretion, but at radically limiting it—a classic means of reducing certain agency costs.¹²⁵ The reliance on judicial discretion at the heart of the principal-agent problem in bail was once a necessary evil;¹²⁶ however, the rise of actuarial risk assessment in recent years provides the means to eliminate it.

II. PREDICTING FLIGHT RISK AND DANGEROUSNESS

Judges make pretrial release decisions with only weak legislative guidance,¹²⁷ and this grant of discretion gives rise to agency costs.¹²⁸ Congress for example, directs federal judges to consider a broad range of factors to assess whether there are conditions of release that will ensure a defendant's presence at trial and protect the safety of the community.¹²⁹ These considerations include: “the nature and circumstances of the offense charged”; “the weight of the evidence against the person”; a range of factors involving the defendant's character such as community ties, family ties, and mental condition; and the “nature and seriousness of the danger” that the defendant might pose to the community or individuals.¹³⁰ States use similar or stronger lan-

tencing purportedly for purposes of concerns about incarceration costs but finding that political economy factors more likely influenced these legislative decisions). One empirical study of legislatures' expanding or limiting the discretion of parole agencies concluded that legislatures “tend to reallocate power away from judges and parole boards when those groups have political ideologies that conflict with the legislatures' preferences.” Dharmapala et al., *supra*, at 1084.

¹²¹ See Wiseman, *supra* note 5, at 1398–401.

¹²² See *supra* Part I.A.

¹²³ See *infra* note 131 (summarizing the state and federal requirements).

¹²⁴ See *supra* Part I.A.

¹²⁵ Dau-Schmidt, *supra* note 58, 667–68 (noting that one of the “primary means” to control judicial agents is “the promulgation of rules instead of standards to limit the delegation of authority from the principal”).

¹²⁶ See notes 60–61 and accompanying text.

¹²⁷ See, e.g., 18 U.S.C. § 3142(g) (2012).

¹²⁸ See *supra* Part I.A.

¹²⁹ 18 U.S.C. § 3142(g).

¹³⁰ *Id.*

guage, specifically defining the charges for which judges must release or detain defendants pretrial.¹³¹

One result of this broad discretion is seemingly arbitrary justice: the same defendant might receive either a high bail amount or release on recognizance—two vastly different pretrial results—depending on the judge that happens to sit at the pretrial proceeding and how the judge perceives the defendant.¹³² Another, as described above, is increased pretrial detention due to the misalignment of the incentives of judges and legislatures.¹³³ Bail is an ancient institution, and for most of its existence, the best option was to rely on judges to assess the risk posed by individual defendants.¹³⁴ Outside of denying bail to those accused of serious crimes, legislatures could not reasonably hope to identify and weigh all of the relevant factors.¹³⁵ In recent years, however, the science (or perhaps art) of actuarial risk assessment has improved to the point where it is able to match or exceed the performance of trained clinicians in gauging risk.¹³⁶

Indeed, in the post-trial context, criminologists and legal scholars widely acknowledge that actuarial projections of future dangerousness—based on a set of objective factors applied to each individual case to assign a probability of dangerousness—are typically more ac-

¹³¹ See PEPIN, *supra* note 35, at 3 (“Twelve states, the District of Columbia, and the federal government have enacted a statutory presumption that defendants charged with bailable offenses should be released on personal recognizance or unsecured bond unless a judicial officer makes an individual determination that the defendant poses a risk that requires more restrictive conditions or detention.”); Baradaran & McIntyre, *supra* note 4, at 509, 509 n.61 (providing examples of these state approaches).

¹³² Mitchell P. Pines, *An Answer to the Problem of Bail: A Proposal in Need of Empirical Confirmation*, 9 COLUM. J.L. & SOC. PROBS. 394, 408 (1973) (“Some crimes trigger different bail amounts by two judges in the same courthouse. An unusual appearance, from the type of jacket to the length of hair, may elicit different bail decisions for the same crime.” (footnote omitted)).

¹³³ See *supra* Part I.A.

¹³⁴ See Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL’Y 119, 122–26 (2004) (describing the history and purpose of bail).

¹³⁵ See *supra* notes 127–28 and accompanying text; cf. Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1341 (2005) (noting certain members of Congress who had “labored so hard” to develop the Sentencing Reform Act in which “a politically neutral body of sentencing professionals—the Sentencing Commission—should set sentencing levels based on careful study of past practice and the best available learning on criminology and corrections” and increasingly negative, political interventions of Congress in the Sentencing Guidelines).

¹³⁶ See, e.g., William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical—Statistical Controversy*, 2 PSYCHOL., PUB. POL’Y, & L. 293, 293–99 (1996) (describing studies in the post-trial setting, as well as beyond the criminal context, that demonstrated that actuarial models were equal or superior to clinical models in their ability to accurately predict tendencies such as dangerousness).

curate and reliable¹³⁷ than clinical models, in which a psychiatrist or other mental health expert makes a subjective, individualized prediction¹³⁸ after interviews with the convicted individual and certain refer-

¹³⁷ See Christopher Slobogin, *Risk Assessment*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 196, 199–200 (Joan Petersilia & Kevin Reitz eds., 2012); Grove & Meehl, *supra* note 136, at 293–99; William M. Grove, *Clinical Versus Statistical Prediction: The Contribution of Paul E. Meehl*, 61 J. CLINICAL PSYCHOL. 1233, 1242 (2005) (summarizing Meehl's works, and subsequent studies that supported Meehl's conclusions, on the superiority of statistical models, concluding that "[u]nless and until the very unlikely happens, and a body of evidence emerges that overturns the massive set of published studies favoring statistical prediction," the use of statistical prediction in predicting human behavior is superior to the clinical approach); Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 AM. CRIM. L. REV. 1443, 1444 (2003) (arguing that actuarial methods are "equal or superior to clinical judgments"); Henry J. Steadman et al., *A Classification Tree Approach to the Development of Actuarial Violence Risk Assessment Tools*, 24 LAW & HUM. BEHAV. 83, 84 (2000) (noting the "persistent finding that actuarial predictions are almost always more accurate than unstructured clinical ones"); Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 118–19, 121–23, 150–57 (1984) [hereinafter Slobogin, *Dangerousness*] (concluding that based on the few actuarial studies available at the time, the actuarial technique was "no better or worse" than clinical techniques, but that actuarial techniques depend on information that is "more explicit and reliable" and more easily challenged and questioned in court, as opposed to the "speculative" nature of clinical opinions, thus recommending limited court use of clinical opinions); Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism* 29 (Vanderbilt Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 15-4, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2583898 [hereinafter Slobogin, *Plea Bargaining*] ("[R]esearch . . . routinely finds actuarial prediction to be superior to 'individualized' clinical prediction.").

¹³⁸ Clinical models have a psychiatrist or other mental health expert present a subjective, individualized prediction of the defendant's dangerousness based on interviews with the defendant and certain references such as family members and employers. See George E. Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics*, 5 AM. J. CRIM. L. 151, 175–77 (1977). Although psychologists and other mental health professionals receive somewhat standardized training in their field, there is no one set of principles that directs how they should determine the dangerousness of defendants. See *id.* at 169 (noting the lack of such standards and proposing self-imposition by mental health professionals of "professionally-acceptable testimony as to the dangerousness of a person"). Organizations like the American Psychological Association do, however, attempt to police and influence the practices of mental health experts in making dangerousness predictions. See, e.g., Brief of Amicus Curiae American Psychological Association in Support of Defendant-Appellant at 6–10, *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007) (No. 04-50393) (arguing that *Daubert* should apply to expert testimony regarding dangerousness and concluding that mental health experts cannot accurately predict dangerousness in certain situations, indicating "it is highly unlikely that a scientifically reliable opinion can be offered that an individual is 'more likely than not' to commit a serious act of violence while confined in prison"); AM. PSYCHOLOGICAL ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT § 2.04, at 5, §§ 9.01, .03, at 12 (2010), <http://www.apa.org/ethics/code/principles.pdf> (providing general guidance regarding "Assessment" and "Competence," including that "[p]sychologists base the opinions contained in their recommendations, reports and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings"; "include in their recommendations, reports and diagnostic or evaluative statements, including forensic testimony, discussion of any

ences like family members and employers. Although the literature has devoted less attention to the use of actuarial models pretrial,¹³⁹ the few studies that address this subject reach similar results.¹⁴⁰ Indeed, an increasing number of studies conclude that in the pretrial context, actuarial models are superior to clinical models in predicting dangerousness.¹⁴¹ Actuarial tools can supplant judicial risk assessment, improving accuracy¹⁴² and reducing agency costs.

limitations on the data obtained”; and that “[p]sychologists’ work [be] based upon established scientific and professional knowledge of the discipline,” but not providing more detailed requirements for forensic testimony); cf. Donald P. Judges, *The Role of Mental Health Professionals in Capital Punishment: An Exercise in Moral Disengagement*, 41 HOUS. L. REV. 515, 587 n.408 (2004) (discussing the limited attention paid to forensic testimony under the 1992 Code of Conduct).

¹³⁹ See Christopher T. Lowenkamp et al., *The Development and Validation of a Pretrial Screening Tool*, FED. PROB., Dec. 2008, at 2, 3 (observing that there have been few “multi-site, racially diverse, empirically validated pretrial [risk] assessments for use in the United States”). But see Baradaran & McIntyre, *supra* note 4, at 554 & n.273 (proposing and running an empirical model for dangerousness—one that suggests that judges currently “overhold” defendants and that, if used, might better predict risk and lead to lower rates of pretrial detention).

¹⁴⁰ See, e.g., 1 JOHN S. GOLDKAMP & MICHAEL R. GOTTFREDSON, 1 GUIDELINES FOR BAIL AND PRETRIAL RELEASE IN THREE URBAN COURTS: THE DEVELOPMENT OF BAIL/PRETRIAL RELEASE GUIDELINES IN MARICOPA COUNTY SUPERIOR COURT, DADE COUNTY CIRCUIT COURT AND BOSTON MUNICIPAL COURT 8–10 (1988) (describing an experiment that encouraged judges to use voluntary actuarial guidelines for assessing flight risk and dangerousness pretrial in Philadelphia, alongside subjective determinations involving the severity of the criminal charge that diluted the relevance of the actuarial assessment, resulting in “a slightly more effective bail approach than the traditional Philadelphia practice” despite the dilution of the actuarial guidelines); MARY A. TOBORG ET AL., LAZAR MGMT. GRP., INC., PRETRIAL RELEASE ASSESSMENT OF DANGER AND FLIGHT: METHOD MAKES A DIFFERENCE 1–2, 5, 105 (1984) (analyzing release rates, dangerous acts committed during pretrial release, and flight, before and after Washington, D.C., began using an actuarial risk assessment tool that separately scored flight risk and dangerousness for defendants, and concluding that “[m]ore defendants secured release on less restrictive conditions under the new system, but there were no offsetting increases in failure-to-appear or pretrial arrest rates,” despite the fact that the pool of pretrial defendants had become riskier in that they had more extensive criminal records and higher drug use); Keith Coopridier, *Pretrial Risk Assessments and Case Classification: A Case Study*, FED. PROB., June 2009, at 12, 15 (noting that the introduction of pretrial risk assessment in one county reduced “disparity and inconsistency in bond recommendations” and “expos[ed] the personal biases and inadequacies of subjective assessment,” and that with the introduction of the risk assessment and associated changes in supervision, violation rates declined).

¹⁴¹ See PEPIN, *supra* note 35, at 6 (“Actuarial risk assessments have higher predictive validity than clinical or professional judgment alone.”); Timothy P. Cadigan, *Implementing Evidence-Based Practices in Federal Pretrial Services*, FED. PROB., Sept. 2009, at 30, 32 (“Pretrial services investigation and supervision practices, just like practices in post-conviction . . . will make more accurate decisions using actuarial data than relying on personal experience or gut-level decisions.”); Christopher T. Lowenkamp & Jay Whetzel, *The Development of an Actuarial Risk Assessment Instrument for U.S. Pretrial Services*, FED. PROB., Sept. 2009, at 33, 33 (“Time and time again . . . actuarial tools have shown greater predictive power than clinical judgment.”).

¹⁴² Lowenkamp & Whetzel, *supra* note 141, at 33, 35. Indeed, failure-to-appear rates remain stubbornly high. See Wiseman, *supra* note 5, at 1361 (“In the seventy-five largest counties

Despite the consensus on the value of actuarial models, they remain underutilized in the pretrial context,¹⁴³ and it appears that no county, state, or federal system uses them to meaningfully circumscribe judicial discretion.¹⁴⁴ A growing number of systems instead rely on pretrial services agencies (or similar entities) to run actuarial models and submit recommendations on release or other pretrial options to judges, who make the ultimate decision.¹⁴⁵ The legal literature, too, has largely focused on the difficulties associated with predicting dangerousness generally, rather than the decisionmaking process.¹⁴⁶ More meaningful use of actuarial models could have a substantial effect on a bail system that currently relies heavily on the ability of judges to predict the dangerousness and flight risk of defendants not yet proven guilty,¹⁴⁷ a reliance that produces significant agency costs.¹⁴⁸ This Part describes the merits of actuarial models in the bail context and the limits of both current practice and existing proposals.

in the country, twenty-one to twenty-four percent of state court felony defendants who were released on bail or personal recognizance between 1990 and 2004 failed to appear at trial.”).

¹⁴³ See Baradaran & McIntyre, *supra* note 4, at 558 (concluding that wider use of evidence-based tools would allow less dangerous defendants to be released while reducing pretrial crime levels).

¹⁴⁴ See Cadigan, *supra* note 141, at 31–32 (“The system as it operates is very much based on looks, raw numbers, or counts and not on outcomes, risk, or any appropriate scientific methodology.”).

¹⁴⁵ As discussed further below, actuarial pretrial models are used in: Virginia, Kentucky, Ohio, and New York; in one county or city apiece in Arizona, Minnesota, Texas, Pennsylvania, and Illinois; in Washington, D.C.; and for certain classes of defendants in the federal system. CHARLES SUMMERS & TIM WILLIS, U.S. DEP’T OF JUSTICE, PRETRIAL RISK ASSESSMENT RESEARCH SUMMARY 2 (2010), <https://www.bja.gov/Publications/PretrialRiskAssessmentResearch-Summary.pdf>; VERA INST. OF JUSTICE, EVIDENCE-BASED PRACTICES IN PRETRIAL SCREENING AND SUPERVISION 2–3 (2010), https://ltgov.delaware.gov/taskforces/djrtf/jtrf_sep26_Handout-EBP%20Pretrial_Revised.pdf.

¹⁴⁶ Professors Baradaran and McIntyre propose a model with specific factors but would have judges use the results of the model to make an individualized bail determination. Baradaran & McIntyre, *supra* note 4, at 554 (“Rather than judges relying on these national conclusions [regarding the most accurate factors for predicting violence], we recommend that local counties estimate a jurisdiction-specific model based on the probit illustrated here. This will provide them with a prediction model best attuned to local circumstances. Once judges have in hand these baseline risks based on past record, initial charge, and age, they can supplement them as needed if there are extenuating circumstances *beyond* the data we have already accounted for.”).

¹⁴⁷ See, e.g., Cadigan, *supra* note 141, at 31 (“The system as it operates is very much based on looks, raw numbers, or counts and not on outcomes, risk, or any appropriate scientific methodology.”); Pines, *supra* note 132, at 408 (“Pre-trial release procedures are unusually vulnerable to the subjectivity of the arraignment judge . . .”).

¹⁴⁸ See *supra* Part I.A.

A. *The Merits of Actuarial Models*

Given the rise of “big data,”¹⁴⁹ the empirical support for the superiority of actuarial models over clinical approaches is, perhaps, unsurprising.¹⁵⁰ In the context of dangerousness determinations through clinical models, which were historically frequently used in violent sexual predator detentions,¹⁵¹ mental health experts applying a clinical model individually formed the criteria that they believe are most relevant to assessing dangerousness. These experts often did not rely on any specific list of factors, but rather made an impressionistic assessment based on their personal interactions with the defendant and possibly some references.¹⁵² Of particular relevance in the bail context is evidence suggesting that even if clinicians attempt to develop a mental list of criteria and consistently apply it, these experts will not perform this task as well as a computer model will.¹⁵³

Actuarial models take a far more standardized and “scientific” approach. While standardization alone does not guarantee accuracy, the best models consistently apply¹⁵⁴ a set of criteria that has been tested for its ability to accurately project dangerousness and flight risk.¹⁵⁵ In a typical model for predicting dangerousness and flight risk,

¹⁴⁹ “Big data” refers to very large sets of electronic information that require sophisticated programs to be properly analyzed. See Jonas Lerman, *Big Data and its Exclusions*, 66 STAN. L. REV. ONLINE 55, 55 n.1 (2013), http://www.stanfordlawreview.org/sites/default/files/online/topics/66_stanlrevonline_55_lerman.pdf (providing various definitions of the term).

¹⁵⁰ See *supra* notes 136–41 and accompanying text.

¹⁵¹ See, e.g., Melissa Hamilton, *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws*, 83 TEMP. L. REV. 697, 720 (2011) (noting the previously common use of clinical assessments).

¹⁵² See *supra* note 138.

¹⁵³ Grove & Meehl, *supra* note 136, at 315 (explaining that if a clinician “attempts to do a subjective, impressionistic, in-the-head approximating job of actuarial computation,” “the clinician’s brain is functioning as merely a poor substitute for an explicit regression equation or actuarial table” because “[h]umans simply cannot assign optimal weights to variables, and they are not consistent in applying their own weights.”).

¹⁵⁴ See Coopridge, *supra* note 140, at 13 (“[O]bjective risk assessment . . . standardizes and makes transparent the risk assessment decision-making process . . . by applying the same set of objective criteria, thus minimizing arbitrariness, individual bias, and systemic disparity.”).

¹⁵⁵ See, e.g., MARIE VANNOSTRAND, CRIME & JUSTICE INST., LEGAL AND EVIDENCE BASED PRACTICES: APPLICATIONS OF LEGAL PRINCIPLES, LAWS, AND RESEARCH TO THE FIELD OF PRETRIAL SERVICES 11 (2007) (“Pretrial risk assessment research conducted over the past 30 years has identified common factors that are good predictors of court appearance and/or danger to the community . . . [including]: Current Charge(s); Outstanding Warrants at Time of Arrest; Pending Charges at Time of Arrest; Active Community Supervision at Time of Arrest . . . ; History of Criminal Convictions; History of Failure to Appear; History of Violence; and Residence Stability [But a] pretrial risk assessment should be validated to ensure it is an accurate predictor of pretrial risk in the community or communities in which it is being applied.”).

these criteria include the length of defendants' past employment, types of prior convictions, stability of the family, and a range of other predictors.¹⁵⁶ For example, in a model in which higher scores indicate dangerousness,¹⁵⁷ a defendant might receive a high score for the "past convictions" element if he has a large number of violent convictions, but a low score for the "employment" element if he has long held down a job.¹⁵⁸ The model then uses the weighted sum of the scores to estimate the risk of flight or future violence.

Neither approach is perfect, of course, and the inaccuracy of clinical techniques for predicting dangerousness is at times overstated.¹⁵⁹ Based on a survey of the most cited studies in this area, Professor Christopher Slobogin notes that, contrary to certain criticisms of clinical assessments as a "coin toss," mental health experts perform better than random chance in projecting dangerousness—viewed generously, one out of every two projections is correct.¹⁶⁰ Nonetheless, the range of accuracy of clinicians' assessments shows problematic variation, with studies indicating that fifty-four to ninety-

¹⁵⁶ See, e.g., Lowenkamp et al., *supra* note 139, at 4–7.

¹⁵⁷ This is the common technique followed in pretrial risk assessment. See, e.g., *id.* at 5 (describing an experimental project to validate a risk assessment tool, in which "[a] higher score corresponds to a greater likelihood of failing to appear or supervision failure."); KIDEUK KIM & MEGAN DENVER, D.C. CRIME POLICY INST., A CASE STUDY ON THE PRACTICE OF PRETRIAL SERVICES AND RISK ASSESSMENT IN THREE CITIES 3, 8 (2011), http://www.dccrimepolicy.org/images/Pretrial-Comparative-final-Report_1.pdf (describing the Washington, D.C., system, where defendants are scored on a variety of flight risk and dangerousness factors, and higher scores represent higher risk).

¹⁵⁸ See, e.g., Lowenkamp et al., *supra* note 139, at 5–7, 7 tbl.4.

¹⁵⁹ Indeed, many have criticized the accuracy of clinical assessments and have even suggested that "flipping a coin" would more accurately predict dangerousness. Slobogin, *Dangerousness*, *supra* note 137, at 111.

¹⁶⁰ See *id.* at 117 ("Correcting for the problems with the research, the accuracy of clinical predications even among populations with high base rates for violent behavior is poor, probably no better than one valid assessment out of two; for other populations, the ratio would undoubtedly be lower." (footnote omitted)); John Monahan, *The Prediction of Violent Behavior: Toward a Second Generation of Theory and Policy*, 141 AM. J. PSYCHIATRY 10, 11 (1984) (surveying the criticisms of clinical prediction and concluding that "[t]here may indeed be a ceiling on the level of accuracy that can ever be expected of the clinical prediction of violent behavior. That ceiling, however, may be closer to fifty percent than to five percent among some groups of clinical interest."). Furthermore, some studies might underestimate clinicians' performance. For example, some researchers that compared actual dangerous behavior of criminals released on parole to clinicians' projections employed a different definition of dangerousness than the clinicians did. In some studies comparing experts' predictions about behavior and actual behavior, it was not even clear that clinicians had made a specific determination of "dangerousness." See Slobogin, *Dangerousness*, *supra* note 137, at 111, 115–16. Clinicians, who were not asked to define dangerousness, might have applied much broader definitions of dangerousness when assessing defendants (i.e., any anti-social behavior) than the authors used, thus making it appear that clinicians substantially overestimated dangerousness. See *id.* at 115–16.

two percent of individuals whom clinicians projected to be violent were in fact not dangerous.¹⁶¹ While clinical models are not meritless, they leave much to be desired.

To be clear, actuarial models are not currently (and may never be) as accurate as we would like given the importance of the issues involved, but there is broad consensus that they are an improvement over clinical models.¹⁶² Whether judges are projecting dangerousness in criminal commitment proceedings for defendants deemed insane, for civil commitment, or parole, actuarial models are the preferred approach. As Professor Slobogin and others observe, although the relevance of actuarial models varies depending on the context in which dangerousness is assessed and the standard of proof in the hearing,¹⁶³ actuarial models consistently perform better than clinical models.¹⁶⁴ Not surprisingly, then, although the literature on actuarial and clinical projections of dangerousness and flight risk in the pretrial context is sparse, the existing studies show that actuarial models consistently predict a defendant's likelihood of committing crimes or failure to appear at trial better than clinical or layperson models do.¹⁶⁵

Despite this, most county¹⁶⁶ and state pretrial systems—where the majority of criminal defendants are found—rely on individual judges, who frequently lack adequate time or resources, to make the bail assessment.¹⁶⁷ Most judges use both subjective criteria and, worse, bail schedules¹⁶⁸—lists that indicate the amount of bail that the judge should set based *solely* on the crime charged.¹⁶⁹ The crime charged is

¹⁶¹ See Slobogin, *Dangerousness*, *supra* note 137, at 110 & n.50 (citing Henry J. Steadman, *A New Look at Recidivism Among Patuxent Inmates*, 5 BULL. AM. ACAD. PSYCHIATRY & L. 200, 209 (1977) (finding a fifty-four to sixty-one percent false positive rate), and Ernst A. Wenk & Robert L. Emrich, *Assaultive Youth: An Exploratory Study of the Assaultive Experience and Assaultive Potential of California Youth Authority Wards*, 9 J. RES. CRIME & DELINQ. 171 (1972) (finding a ninety-two percent false positive rate)). Professor Slobogin noted that those studies likely exaggerated the rate of false positives, however. *Id.* at 110 n.50.

¹⁶² See *supra* notes 137, 140.

¹⁶³ Slobogin, *Dangerousness*, *supra* note 137, at 102–03 (noting that different contexts such as civil and criminal commitment involve different meanings of dangerousness and place different burdens of proof on the state or the individual to demonstrate or disprove dangerousness).

¹⁶⁴ See *supra* notes 137, 140.

¹⁶⁵ See *supra* note 140.

¹⁶⁶ Cf. PRETRIAL JUSTICE INST., PRETRIAL JUSTICE IN AMERICA: A SURVEY OF COUNTY PRETRIAL RELEASE POLICIES, PRACTICES AND OUTCOMES 5 (2009), <http://www.pretrial.org/download/research/PJI%20Pretrial%20Justice%20in%20America%20-%20Scan%20of%20Practices%202009.pdf>.

¹⁶⁷ See Colbert, *supra* note 20, at 1755.

¹⁶⁸ PRETRIAL JUSTICE INST., *supra* note 166, at 7.

¹⁶⁹ *Id.* at 5.

an extremely rough, singular indicator of likely dangerousness and flight risk compared to the sophisticated actuarial models deployed elsewhere, and judges augment this rudimentary predictor only with impressionistic assessments reached after questioning a defendant for a few minutes, at best.¹⁷⁰ Bail schedules are the worst sort of “actuarial” instrument, and their widespread use is an indicator of both how little time judges have to devote to pretrial release determinations and how little accuracy appears to matter in most systems.

B. The Status Quo: Limited, Advisory Use of Actuarial Assessments Pretrial

In the typical pretrial hearing, the use of actuarial data is rare, and the judge spends several minutes, if that, hearing a defendant’s story.¹⁷¹ The defendant often lacks representation,¹⁷² and the judge quickly assesses the likelihood that the defendant will flee or commit crimes if he is released pending trial. The judge typically must consider a variety of statutorily defined factors in making this determination. For example, as introduced in Part I, the influential federal Bail Reform Act lists release as the first option that federal judges should consider in a pretrial hearing.¹⁷³ The Act lists eleven factors for judges to consider in deciding whether to detain rather than release the defendant, including, *inter alia*, the defendants’ mental health, community and family ties, prior convictions, appearance rates for court proceedings, and employment status.¹⁷⁴ Many states’ bail statutes use similar language.¹⁷⁵

In practice, initial impressions and gut reactions to the few answers a defendant has time to give in a brief bail hearing likely influence the determination just as much as the statutory factors do.¹⁷⁶

¹⁷⁰ See Colbert, *supra* note 20, at 1755; see also MAHONEY ET AL., *supra* note 114, at 63, 65; Pines, *supra* note 132, at 408.

¹⁷¹ See Colbert, *supra* note 20, at 1755.

¹⁷² Colbert, *supra* note 87, at 386.

¹⁷³ 18 U.S.C. § 3142(a) (2012) (“Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—(1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section . . .”).

¹⁷⁴ *Id.* § 3142(g).

¹⁷⁵ See *supra* note 131.

¹⁷⁶ CYNTHIA A. MAMALIAN, PRETRIAL JUSTICE INST., STATE OF THE SCIENCE OF PRETRIAL RISK ASSESSMENT 17 (2011), https://www.bja.gov/publications/pji_pretrialriskassessment.pdf (“[T]he majority of pretrial programs (64 percent) use a combination of objective and subjective criteria in risk assessment, and 12 percent of pretrial programs rely exclusively on subjective criteria (e.g., gut feeling, professional experience, etc.).”); Pines, *supra* note 132, at 408 (“An

Further, some judges admit to using bail as a sort of “expressive” tool to send a message about the seriousness of the alleged crime despite the defendants’ presumed innocence.¹⁷⁷

In addition to their impressions and inclinations, many judges—sixty-four percent of large county court judges, for example—also rely on bail schedules,¹⁷⁸ as introduced above. These schedules typically consider only the charge in determining the bail amount.¹⁷⁹ While judges may deviate from the schedule,¹⁸⁰ and most may order release,¹⁸¹ release with monitoring,¹⁸² or detention in lieu of money bail, bail schedules tend to be a dominant factor driving the judge’s bail decision.¹⁸³ The combination of bail schedules and subjective, impressionistic predictions by judges leads to release results that differ substantially among courts,¹⁸⁴ judges within one court,¹⁸⁵ and defendants appearing before the same judge.¹⁸⁶ It does not appear that these different rates consistently match differences in the dangerousness of de-

unusual appearance, from the type of jacket to the length of hair, may elicit different bail decisions for the same crime.”).

¹⁷⁷ Pines, *supra* note 132, at 408 (“Judges have admitted using bail to break crime waves . . . [and] teach first offenders a lesson . . .”).

¹⁷⁸ PRETRIAL JUSTICE INST., *supra* note 166, at 5, 7; *supra* text accompanying note 169.

¹⁷⁹ See *supra* note 169 and accompanying text.

¹⁸⁰ See, e.g., CAL. PENAL CODE § 1270.1(d) (West 2015) (“If the judge or magistrate sets the bail in an amount that is either more or less than the amount contained in the schedule of bail for the offense, the judge or magistrate shall state the reasons for that decision and shall address the issue of threats made against the victim or witness, if they were made, in the record.”); PRETRIAL JUSTICE INST., *supra* note 166, at 6 (noting the Santa Clara County, California Superior Court practice of allowing deviation from the bail schedule).

¹⁸¹ PRETRIAL JUSTICE INST., *supra* note 166, at 8 (noting that all 112 of the counties that responded to the survey “reported that non-financial release options are available to the court, including release on recognizance . . . and release with non-financial conditions”).

¹⁸² See *id.* at 9–10 (describing nonfinancial conditions imposed on released defendants).

¹⁸³ MAMALIAN, *supra* note 176, at 17 (“[J]udges are still dependent on the use of bond schedules in making pretrial release decisions.”).

¹⁸⁴ See, e.g., GOLDKAMP & GOTTFREDSON, *supra* note 140, at 210–11 (comparing pretrial release practices in three county courts in Boston, Florida, and Arizona prior to the implementation of actuarial guidelines and concluding that “bail decisions were disparate—they could not systematically be explained by objective factors,” and further noting that judges’ predictions of dangerousness varied in range, as evidenced by misconduct rates of “16 percent of released felony defendants in Dade and Maricopa to 30 percent in Boston”); VanNostrand & Keebler, *supra* note 50, at 22 (noting that in 2006 in federal district courts, pretrial release rates “ranged from a high of 74.5 percent released in Vermont to a low of 11.2 percent released in Arizona”).

¹⁸⁵ Pines, *supra* note 132, at 408 & n.80 (“Some crimes trigger different bail amounts by two judges in the same courthouse.”).

¹⁸⁶ *Id.* at 408 n.81 (describing three defendants appearing in pretrial hearings before the same judge on one day, all three for marijuana cases and all of whom had “no prior record and no special risks of nonappearance,” with two receiving bail amounts of \$500 and one receiving \$2,000).

fendant populations entering each courtroom. Judges, then, as a class, do not appear to be consistently or objectively applying the factors that legislatures hope they will in predicting dangerousness or flight risk.¹⁸⁷ Given the wide variation in judicial experience, temperament, and caseload, it would be surprising if they did. Perhaps as a result, some jurisdictions have moved to an at least partially actuarial model, although none places meaningful restraints on judicial discretion.¹⁸⁸

1. *County and State Models*

Most accounts of pretrial actuarial tools identify the Vera Institute's Manhattan Bail Project, instituted in 1961, as the first actuarial-type screening program in the United States.¹⁸⁹ Students from the New York University School of Law, supervised by the Vera Foundation, interviewed defendants in the Criminal Court of the Borough of Manhattan to determine whether they might be good candidates for pretrial release,¹⁹⁰ asking about the length of their residency at a particular location, their current and recent employment, relatives with whom they had contact in New York City, previous convictions, and other factors.¹⁹¹ For defendants who met at least two of the factors, interviewers followed up with references to try to confirm the information.¹⁹² Staff then considered a number of additional factors,¹⁹³ such as whether the defendant had a close relationship with his family, whether the family had "special circumstances" such as "pregnancy or severe illness," the responsibilities that the defendant had at his job, and whether his job would remain open. Then they determined whether to recommend pretrial release on parole.¹⁹⁴ The project was experimental, however, and students therefore did not make recom-

¹⁸⁷ See, e.g., GOLDKAMP & GOTTFREDSON, *supra* note 140, at 210–11 (noting that in a Boston study, where the authors examined the state of pretrial decisions prior to the implementation of a risk-assessment model, "at the request of the judiciary, we even constructed an empirical model based on the criteria suggested by statute since the judiciary told us that they followed these 'guidelines.' This 'legal' model failed to be associated with the actual decisions of the Boston judges, contrary to their predictions but consistent with the expectations of the guidelines approach," and concluding that for truly objective risk assessment to occur, "explicit decisionmaking guidelines" are necessary).

¹⁸⁸ See *supra* notes 143–45 and accompanying text.

¹⁸⁹ E.g., PEPIN, *supra* note 35, at 6; Lowenkamp et al., *supra* note 139, at 3.

¹⁹⁰ Charles E. Ares et al., *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. REV. 67, 71–72 (1963).

¹⁹¹ *Id.*

¹⁹² *Id.* at 72–73.

¹⁹³ *Id.* at 73.

¹⁹⁴ *Id.* at 73–74.

mentations to the judge for each defendant.¹⁹⁵ The defendants' questionnaire responses were randomized and placed within an experimental or control group.¹⁹⁶ For the control group, students did not transmit their recommendation to the judge making the bail decision, whereas experimental group recommendations were transmitted.¹⁹⁷ This allowed students to determine whether judges appeared to be influenced by recommendations.¹⁹⁸

A small number of cities implemented pretrial screening in their bail systems soon after the Manhattan Bail Project. Washington, D.C. formed a bail agency—the equivalent of a pretrial services agency—in 1966 and, starting in 1971, directed judicial officers making bail decisions to consider dangerousness and flight risk in noncapital cases.¹⁹⁹ The District of Columbia now requires its pretrial services agency to “interview any person detained pursuant to law or charged with an offense” and to “prepare a written report of the information for submission to the appropriate judicial officer.”²⁰⁰ The report must describe “the person accused, his family, his community ties, residence, employment, and prior criminal record,”²⁰¹ and “where appropriate,” recommend whether the defendant should be released.²⁰² Diagnostic Pretrial Services Officers gather this information through background investigations and client interviews soon after a defendant's arrest, and they conduct a formal risk assessment with a thirty-eight factor point scale.²⁰³ Different factors, such as substance abuse, prior convictions, and whether there was a weapon involved in the offense charged, receive different points, with the total score designed to indicate flight risk and the likelihood of re-arrest.²⁰⁴ The score places the defendant in one of three categories, from low- to high-risk, and the Pretrial Services Officer makes a recommendation to the judge “based in part on the risk score and the defendant's eligibility for statutory detention.”²⁰⁵

Many county courts—about eighty-five percent of courts in large counties—report having some sort of screening agency that investi-

¹⁹⁵ *Id.* at 74.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ KIM & DENVER, *supra* note 157, at 3.

²⁰⁰ D.C. CODE § 23-1303(a) (2014).

²⁰¹ *Id.*

²⁰² *See* § 23-1303(b).

²⁰³ KIM & DENVER, *supra* note 157, at 8.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

gates certain defendants' likely dangerousness and flight risk and makes recommendations to a court.²⁰⁶ But much of this screening is not actuarial: "[twenty-four] percent of programs [in large counties] rely only on objective criteria in making their risk assessments,"²⁰⁷ and twelve percent "rely exclusively on subjective criteria (e.g., gut feeling, professional experience, etc.)."²⁰⁸ Even objective criteria are often not strictly actuarial, in that they are not used in a careful, deliberate fashion to assess a probability of risk; rather, they add together a variety of risk factors to arrive at a very rough score.²⁰⁹ The cities and counties that have experimented with or implemented truer actuarial models (in addition to Washington, D.C.) include, inter alia, eleven counties in Arizona;²¹⁰ Harris County, Texas;²¹¹ Philadelphia and Allegheny County, Pennsylvania;²¹² three Illinois counties;²¹³ New York City, New York;²¹⁴ Lucas County, Ohio;²¹⁵ Yakima County, Washing-

²⁰⁶ PRETRIAL JUSTICE INST., *supra* note 166, at 5. Approximately seventy-six percent of the eighty-five percent of counties that responded to the survey exclude at least one category of defendants from screening. *Id.* And out of all 3000 U.S. counties, approximately 1000 counties rely on 200–300 pretrial services programs to guide judges. MAMALIAN, *supra* note 176, at 12. The study provides no information as to whether the remaining 2000 counties have—or lack—pretrial services programs. *Id.*

²⁰⁷ MAMALIAN, *supra* note 176, at 17.

²⁰⁸ *Id.*

²⁰⁹ Cadigan, *supra* note 141, at 31 (noting, prior to the development of an actuarial pretrial tool in federal courts in 2009, that "[t]he system as it operates is very much based on looks, raw numbers, or counts and not on outcomes, risk, or any appropriate scientific methodology."). Many of the county programs described here seem to use this relatively rough model.

²¹⁰ MARICOPA CTY. ADULT PROB. DEP'T, MARICOPA COUNTY ADULT PROBATION FY2012 ANNUAL REPORT 8 (2012), <http://www.superiorcourt.maricopa.gov/adultprobation/docs/2012annualreport.pdf>; Press Release, More Than 20 Cities and States Adopt Risk Assessment Tool to Help Judges Decide Which Defendants to Detain Pretrial, LAURA & JOHN ARNOLD FOUND. (June 26, 2015), <http://www.arnoldfoundation.org/more-than-20-cities-and-states-adopt-risk-assessment-tool-to-help-judges-decide-which-defendants-to-detain-prior-to-trial/>.

²¹¹ STEVEN JAY CUVELIER & DENNIS W. POTTS, A REASSESSMENT OF THE BAIL CLASSIFICATION INSTRUMENT AND PRETRIAL RELEASE PRACTICES IN HARRIS COUNTY, TEXAS 1–3 (1997), <http://www.harriscountytexas.gov/CmpDocuments/59/Library/BCPP1996.pdf> (describing 1993 and 1996 bail classification projects).

²¹² JOHN CLARK, ET AL., PRETRIAL JUSTICE INST., ASSESSMENT OF PRETRIAL SERVICES IN PHILADELPHIA 2–3 (2011), <http://www.courts.phila.gov/pdf/report/ri/Assessment-of-Pretrial-Services-in-Philadelphia-Pretrial-Justice-Institute.pdf>.

²¹³ LAURA & JOHN ARNOLD FOUND., *supra* note 210.

²¹⁴ *Cf. Operation's Pretrial Services and Special Programs*, N.Y.C. CRIM. JUST. AGENCY, <http://www.nycja.org/operations-pretrial-services-and-special-programs/> (last visited Feb. 13, 2016) (noting that the agency "interviews virtually all defendants in NYC that are held for arraignment in police detention, to determine their ties to the community" and "attempts to verify the information provided during the interview then makes a release recommendation to the Court assessing the likelihood of continued appearance in court if the defendant is released in lieu of money bail").

²¹⁵ LAURA & JOHN ARNOLD FOUND., *supra* note 210.

ton;²¹⁶ Milwaukee County, Wisconsin;²¹⁷ Mecklenburg County, North Carolina;²¹⁸ and Hennepin County, Minnesota.²¹⁹ Others are in the process of adopting actuarial models.

Virginia has used a pretrial risk assessment tool since 2003, but, as with many other programs, not all defendants receive the benefit of this actuarial assessment.²²⁰ Pretrial officers are required to use the Virginia Pretrial Risk Assessment Instrument (“VPRAI”) for all adult defendants who are not incarcerated on unrelated charges and have been arrested for a jailable, criminal offense.²²¹ Pretrial officers must complete an assessment with this tool within seven days of arrest.²²² The VPRAI is computerized, and officers enter data into the program in three steps. In step one, the officer enters “yes” or “no” for nine risk factors.²²³ These factors include, among others, whether the defendant has lived at his residence for less than one year; is a primary caregiver; has been consistently employed for two years; has outstanding warrants at the time of arrest; has a history of jailable criminal offenses; has two or more failures to appear in court; and has two or more violent convictions.²²⁴ The program then generates a risk level of low, below average, average, above average, or high.²²⁵ In step two, the officer inputs any additional mitigating factors or risk considerations.²²⁶ For certain pretrial agencies, officers at this stage may also check a box indicating that the defendant meets the presumptions of bail specified in the Code of Virginia.²²⁷ In step three, the officer next selects whether she recommends pretrial supervision, suggests terms

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ FOURTH JUDICIAL DIST. OF MINN. RESEARCH DIV., FOURTH JUDICIAL DISTRICT PRETRIAL EVALUATION: SCALE VALIDATION STUDY 1 (2006), http://www.mncourts.gov/Documents/4/Public/Research/PreTrial_Scale_Validation_%282006%29.pdf (describing the County’s “Pretrial Scale” that is used to conduct a “full bail evaluation” that identifies defendant risk).

²²⁰ VA. DEP’T OF CRIMINAL JUSTICE SERVS., VA PRETRIAL RISK ASSESSMENT INSTRUMENT TRAINING: VIRGINIA PRETRIAL RISK ASSESSMENT (VPRAI) INSTRUCTION MANUAL 1, <https://www.dcs.virginia.gov/corrections/documents/vpraiManual.pdf>.

²²¹ *Id.* at 3.

²²² *Id.*

²²³ *Id.* at 5–8.

²²⁴ *Id.*

²²⁵ *Id.* at 8.

²²⁶ *Id.* at 9–10. For example, the officer may describe recent employment or other life changes for the Judicial Officer to consider in making the bail decision. *See, e.g., id.* at 10 fig.6 (“Although the defendant poses a risk due to residence and employment, he recently obtained employment at American Auto and has purchased a home in the local area.”).

²²⁷ *Id.* at 8–9.

and conditions for bail or supervision,²²⁸ and then generates a report to be used by a judge or magistrate at the pretrial hearing.²²⁹

Kentucky also has a leading pretrial risk assessment and diversion program. In 2012 the legislature required the state to follow an evidence-based approach to pretrial assessment, specifically mandating an “objective, research-based, validated assessment tool”²³⁰ that would categorize defendants as low, medium, and high risk.²³¹ The use of this tool has increased the percentage of defendants released pretrial by approximately five percent, while pretrial crime rates have remained the same.²³² In 2013, all counties in Kentucky began using an actuarial pretrial risk assessment tool—the Public Safety Assessment—developed and empirically tested by the Laura and John Arnold Foundation.²³³ The Kentucky Legislature views the state’s risk assessment approach as both requiring more consideration of actuarial data and of somewhat limiting judicial exercise of discretion in setting bail, although judges still make the final pretrial release decision and may consider factors beyond the actuarial data.²³⁴

Ohio takes a similar approach pretrial. The state contracted with the University of Cincinnati to develop the Ohio Risk Assessment System.²³⁵ Experts developed this risk assessment model by conducting interviews with defendants to identify relevant factors for the

²²⁸ *Id.* at 11–12. Examples of terms and conditions include refraining from drug and alcohol use or avoiding contact with victims. *Id.*

²²⁹ *Id.* at 12.

²³⁰ KY. REV. STAT. ANN. § 446.010 (West 2015); *see also* KY. DEP’T OF PUB. ADVOCACY, KENTUCKY PRETRIAL RELEASE MANUAL 33–34 (2013), <http://dpa.ky.gov/NR/rdonlyres/D45BB632-4BCA-4BE6-B396-8CB20D917352/0/PretrialReleaseManualFINAL071713.pdf> (describing the pretrial risk assessment system that the State of Kentucky has implemented).

²³¹ KY. REV. STAT. ANN. § 431.066 (West 2015).

²³² *See* PEPIN, *supra* note 35, at 8; *cf.* Eileen Sullivan & Ronnie Greene, *States Predict Inmates’ Future Crimes With Secretive Surveys*, ASSOCIATED PRESS, Feb. 24, 2015, <http://big-story.ap.org/article/027a00d70782476eb7cd07fbcca40fc2/states-predict-inmates-future-crimes-secretive-surveys> (citing Ed Monahan, Kentucky’s Public Advocate, who provides a lower estimate of a three percent increase in number of defendants released before trial). Jail populations in other areas using pretrial risk assessment have declined even more, with a drop of nearly twenty percent in Mecklenburg County, North Carolina. LAURA & JOHN ARNOLD FOUND., *supra* note 210.

²³³ LAURA & JOHN ARNOLD FOUND., DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT 4–5 (2013), <http://www.pretrial.org/download/research/Developing%20a%20National%20Model%20for%20Pretrial%20Risk%20Assessment%20-%20LJAF%202013.pdf>.

²³⁴ *See* KY. R. CRIM. P. 4.10 (requiring courts in “the exercise” of their pretrial determination “discretion” to give due consideration to pretrial services agency recommendations).

²³⁵ EDWARD LATESSA ET AL., UNIV. OF CINCINNATI, CREATION AND VALIDATION OF THE OHIO RISK ASSESSMENT SYSTEM FINAL REPORT 2 (2009), http://www.ocjs.ohio.gov/ORAS_FinalReport.pdf.

model.²³⁶ They created five assessment tools and then validated the tools by “examining the predictive power of the assessment instruments” and their ability to “significantly distinguish between risk levels.”²³⁷ Many courts in New York State also use risk-screening tools pretrial, although the state has not developed a statewide tool.²³⁸ Similarly, in Colorado twelve counties conduct pretrial risk assessments and make recommendations to judges, although their risk assessment tools differ.²³⁹ A statewide tool, based on empirical assessments of the factors that most strongly predict pretrial misconduct, is now available to these counties.²⁴⁰ And the actuarial Public Safety Assessment deployed in Kentucky will also be used throughout Arizona and New Jersey,²⁴¹ and it will soon be ready for national deployment in any jurisdiction that chooses to use the tool.²⁴²

Many states appear to have considered the use of actuarial pretrial risk assessment—the Conference of State Court Administrators specifically recommends this method—but the Conference notes that “there is resistance to changing the status quo from those who are comfortable with or profit from the existing system.”²⁴³

2. Federal Programs

Unlike counties and states, where the use of actuarial models to advise judges pretrial is rare but growing,²⁴⁴ the federal pretrial services system uses an actuarial risk assessment tool for pretrial defendants in nearly all districts.²⁴⁵ However, the tool—apparently due to resource constraints or a stubborn refusal of certain districts to pro-

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ See CRIME & JUSTICE INST., ASSESSMENT OF PRETRIAL SERVICES IN NEW YORK STATE 6–7, 23 (2014), <http://www.criminaljustice.ny.gov/opca/pdfs/NYS-Pretrial-Release-Report-7-1-2014.pdf>.

²³⁹ PRETRIAL JUSTICE INST. & JFA INST., THE COLORADO PRETRIAL ASSESSMENT TOOL (CPAT) 5 (2012), <http://www.pretrial.org/download/risk-assessment/CO%20Pretrial%20Assessment%20Tool%20Report%20Rev%20-%20PJI%202012.pdf>.

²⁴⁰ *Id.* at 5, 19.

²⁴¹ LAURA & JOHN ARNOLD FOUND., *supra* note 210.

²⁴² Shaila Dewan, *Judges Replacing Conjecture With Formula for Bail*, N.Y. TIMES (June 26, 2015), http://www.nytimes.com/2015/06/27/us/turning-the-granting-of-bail-into-a-science.html?mabReward=CTM&action=click&pgtype=Homepage®ion=CCColumn&module=Recommendation&src=rechp&WT.nav=RecEngine&_r=0.

²⁴³ PEPIN, *supra* note 35, at 10.

²⁴⁴ See Dewan, *supra* note 242 (noting that “fewer than 10 percent of jurisdictions use” “scientifically validated risk assessments”).

²⁴⁵ Cadigan & Lowenkamp, *supra* note 16, at 33 (“National implementation was completed in almost all 93 districts by August 2011.”).

duce reports—is used for only about one-sixth of the defendants processed through the system.²⁴⁶ The PTRAs, developed in 2009 at the direction of the Office of U.S. Courts and the Office of the Federal Detention Trustee, uses eleven scored factors to assess a defendant's risk, and nine unscored factors that are used for research purposes.²⁴⁷ Each of the factors can receive zero to two points, and, similar to the state and local models, the total points determine the overall risk score.²⁴⁸ Risk scores, in turn, place a defendant in one of five risk categories.²⁴⁹ Pretrial officers trained and certified in using the tool generate a report with a score and provide the report to a judge, who makes the final bail decision.²⁵⁰

As seen above, although the use of actuarial risk assessment pretrial is still rare, it is becoming more common. This is a very welcome development, but all of the proposed and deployed systems so far share a common feature that threatens to undermine their effectiveness: they maintain a prominent role for judges, thus leaving a large space for subjective, layperson determinations.²⁵¹ As discussed in Part I, although some jurisdictions have seen increases in pretrial release by preparing risk reports and providing them to judges,²⁵² merely making actuarial predictions available to judges is a very important, yet partial, step.²⁵³ Rather than informing judicial discretion, actuarial instruments should limit it. The following Part argues that the use of mandatory bail guidelines based on actuarial risk assessment would address the principal-agent problem in bail and improve the quality of pretrial decisionmaking.

III. IMPROVING PRETRIAL DETENTION DECISIONMAKING: IMPLEMENTING A SYSTEM OF MANDATORY BAIL GUIDELINES

As discussed in Part I, the current methods of assessing likely dangerousness and the risk of flight in the pretrial context create a major agency cost problem, one in which judges fail to follow the di-

²⁴⁶ *Id.* (“The federal system averages about 26,000 pretrial investigations and reports per quarter. Unfortunately, the PTRAs are averaging about 4,000 per quarter, leaving 22,000 reports without the PTRAs scores.”).

²⁴⁷ *Id.* at 32. The nine unscored factors, although they do not contribute to the overall risk score, are “analyzed for future revisions aimed at improving the predictive value of the tool.” *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *See supra* Part I.B.4.

²⁵² *See supra* note 35 and accompanying text.

²⁵³ *See supra* Part I.B.4.

rectives of their principals—directives that often would have judges detain defendants pretrial only if alternative conditions would not assure appearance at trial and would inadequately protect society from dangerous arrestees.²⁵⁴ Judicial discretion is by no means the sole cause of the pretrial detention crisis. Indeed, scholars have only recently begun to empirically examine the relative importance of the variety of factors affecting outcomes, including discretion, judges' resource constraints, and the general lack of pretrial legal representation.²⁵⁵ But discretion seems to be a significant factor, as suggested by the fact that when judges' discretion is more constrained, it appears that more defendants are released without a concomitant increase in crime or flight.²⁵⁶ Yet legislatures cannot use traditional means of controlling agents. They cannot easily reduce judges' salaries or fire them for insubordination.²⁵⁷ In light of the limits of existing approaches to reining in agency costs in bail, this Part assesses how legislatures could best align judicial and congressional incentives in pretrial detention using relatively specific rules for assessing dangerousness and the risk of flight. Although the modest changes discussed in Part I could accomplish some of this alignment, this Part focuses on a more vigorous approach. Specifically, it proposes that Congress and state legislatures form, respectively, federal and state bail commissions that use actuarial models to prescribe mandatory bail guidelines for judges to follow. Under this proposal, judges may depart from these prescriptions only in limited ways.

Limiting judicial discretion would not alone address agency costs, but it would free up valuable judicial time for other important tasks and would likely move bail decisions substantially closer to those envisioned by Congress and state legislatures.²⁵⁸ Risk assessment tools undergo constant revision, however, and release thresholds must be flexible to address community needs and experience; thus, actuarial

²⁵⁴ See *supra* note 131.

²⁵⁵ See, e.g., Baradaran & McIntyre, *supra* note 4, at 553 (noting that a model without judicial discretion would produce more efficient results); Colbert, *supra* note 87 at 342 (explaining that a lack of representation at pretrial stages produces inequitable results); Pines, *supra* note 132, at 408 (describing how the judge's subjective impression of the defendant greatly affects the pretrial outcome).

²⁵⁶ See *supra* notes 35–36 and accompanying text.

²⁵⁷ See *supra* notes 81–82 and accompanying text.

²⁵⁸ Cf. Dau-Schmidt, *supra* note 58, at 669–73 (describing the effects of the Sentencing Reform Act of 1984 as restraining the discretion of judges in the sentencing context and thus addressing agency costs).

approaches are difficult for legislatures to enact directly.²⁵⁹ Crafting these guidelines will require expertise, flexibility, and a degree of political independence, all of which point toward the creation of agencies, or bail commissions, charged with that task.²⁶⁰ That this Article's proposed commissions bear more than a passing resemblance to the United States Sentencing Commission is not a coincidence; the Commission and its Sentencing Guidelines provide a useful, if imperfect, model for addressing the challenges of drafting bail guidelines.²⁶¹ Indeed, the history of the sentencing reform movement reflects many of the challenges of the current bail system, with judges, who had nearly "unfettered discretion" in sentencing,²⁶² issuing widely differing sentences for defendants with similar characteristics who were convicted of the same crimes.²⁶³ The length of each defendant's sentence was primarily based on an assessment of the defendant's criminal history and the nature of the crime for which he was convicted, and the judge relied on an individual expert's assessment of the likelihood of rehabilitating each defendant.²⁶⁴ The more difficult that rehabilitation likely would be, the longer the sentence imposed.²⁶⁵ This system of individualized assessment drove the disparate sentences that would become the target of sentencing reform and mandatory guidelines, as did concerns that judges were too politically influenced.²⁶⁶ The public, saturated with frequent media accounts of heinous crimes, largely believed that sentences issued under this discretionary system were too lenient, but some favoring sentencing reform were also concerned about judicial pressures to be increasingly "tough on crime" and not sufficiently concerned with the societal costs of increased incarceration.²⁶⁷

²⁵⁹ Cf. Barkow, *supra* note 74, at 743 & n.80 (describing the difficulty that legislatures face in addressing the issue of computing sentences).

²⁶⁰ Cf. *id.* at 742–43.

²⁶¹ See Dau-Schmidt, *supra* note 58, at 672–73.

²⁶² *Id.* at 659–60.

²⁶³ *Id.* at 660 (noting that one problem that the the Sentencing Reform Act of 1984 attempted to address was the "disparity in the sentences levied by different judges").

²⁶⁴ See Barkow, *supra* note 74, at 737 ("Sentencing experts initially made recommendations on how a particular defendant should be sentenced based on that defendant's prospects for rehabilitation. They were experts in individuation.").

²⁶⁵ *Id.* at 739–41.

²⁶⁶ *Id.* at 742 ("Sentencing reformers from both ends of the political spectrum believed that the solution was to set sentencing policy in the aggregate, because they thought that would eliminate the disparity, irrationality, and unpredictability that both sides found so troubling.").

²⁶⁷ See *id.* at 759 (explaining that one member of the House of Representatives, who proposed a sentencing commission composed entirely of judges, believed that "'a presidentially-appointed panel can too easily be dominated by political interests' and might succumb to pres-

The problems with judicial discretion were in part problems of agency cost.²⁶⁸ Judges acting on behalf of Congress and state legislatures, which set criminal justice policies, failed to issue uniform sentences.²⁶⁹ Because they did not respond directly to an electorate or to Congress,²⁷⁰ judicial agents did not account for the costs of prisons in issuing long sentences, and they harbored vastly different opinions about the appropriate severity of punishments and the ability of defendants to be rehabilitated.²⁷¹ The rules that emerged from the 1984 Sentencing Reform Act were thus efforts by federal legislative principals to rein in the disparate goals of judicial agents.²⁷² In establishing the Federal Sentencing Commission (“Commission”), Congress created an agent positioned between Congress and the courts that would develop a set of guidelines to be followed in all federal sentencing cases.²⁷³ Although Congress formed an independent commission within the judicial branch, it retained a substantial amount of control over the Commission, identifying the groups that the President had to consult before appointing Commission members and prohibiting the removal of appointed members except for cause.²⁷⁴ Congress also prevented the sentencing guidelines from becoming effective until 180

tures to ‘appear[] tough on crime’” (quoting Peter W. Rodino, Jr., *Federal Criminal Sentencing Reform*, 11 J. LEGIS. 218, 231 (1984) (alteration in original))).

²⁶⁸ Dau-Schmidt, *supra* note 58, at 661; *see also* Rave, *supra* note 55, at 694 (“Any time one person enlists another to act on his or her behalf, agency costs are present. Because their interests are not identical, there are costs involved in getting agents to act in the best interests of their principals.”).

²⁶⁹ Dau-Schmidt, *supra* note 58, at 670.

²⁷⁰ *Id.* at 666–67 (noting that it is difficult to identify the appropriate principal when applying the agency cost model to the administrative agency or judicial context, as the principal could be the electorate or the legislature); Rave, *supra* note 55, at 694 (noting that Congress can be viewed as an agent of the electorate and that “[t]he interests of politicians and their constituents may diverge on many issues, and elections alone are not sufficient to bring their interests in line”); Rave, *supra* note 55, at 718–19 (observing that “[a] major difference between the agency problems in public and private law is in determining the interests of the principals” because if the principal is the electorate, “[t]here are some interests that are nearly universally shared by the people (for example, security or law and order), but on most issues the people’s interests will diverge and will often be in direct conflict”).

²⁷¹ Barkow, *supra* note 74, at 759 n.151 (noting that, regarding the proposal to form a commission comprised entirely of judges, “[t]he Senate rejected this proposal because they viewed judges as the source of the disparity problem they were trying to solve”).

²⁷² Dau-Schmidt, *supra* note 58, at 670–72.

²⁷³ *Id.* at 672.

²⁷⁴ *See* Barkow, *supra* note 74, at 758 (describing the institutional design of the Commission).

days after they were issued, thus retaining the power to reject proposed guidelines in the interim.²⁷⁵

The progression of sentencing from individualized, discretionary assessment to a uniform set of largely mandatory rules is far from a story of unparalleled success. The sentencing guidelines were costly to develop,²⁷⁶ judges complained of the costs of implementing the guidelines in each case,²⁷⁷ and sentences have continued to increase—in large part due to the guidelines themselves and prosecutors' incentives to overcharge and obtain high mandatory sentences²⁷⁸—while also remaining highly disparate. Indeed, using rules rather than standards to control agents can be costly.²⁷⁹ Complex problems demand complex rules and thus threaten to make rules unmanageable.²⁸⁰ But judicial application of the Bail Reform Act and similar state statutes for more than two decades shows that standards have failed in the pretrial context.²⁸¹ And attempts by Congress to better match judicial and congressional incentives through clear rules in the sentencing context provide valuable lessons, both positive and negative, for bail. Fixing bail requires addressing agency costs, and creating bail commissions to craft and impose guidelines based on validated risk assessment tools is a logical way of achieving that goal and reducing pretrial detention. This Part develops this proposal and responds to likely objections.

275 See *id.* at 760 (“This delay gives the legislature greater control than it has in the typical agency scenario . . .”).

276 Dau-Schmidt, *supra* note 58, at 673–74.

277 *Id.* at 674 (citing FED. COURTS STUDY COMM., JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 137 (1990)) (“In a study by the Federal Courts Study Committee, ninety percent of the judges responding to the survey said that the guidelines have made sentencing procedures more, not less, time consuming.”).

278 See Bowman, *supra* note 135, at 1347 (“[T]he guidelines identify a host of offense-related aggravating factors (use of a weapon, injury to a victim, size of the loss, role in the offense) that almost always increase the offense level, but they restrict judicial consideration of the most common mitigating factors . . .”).

279 See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 562 (1992).

280 See Dau-Schmidt, *supra* note 58, at 674 (“[W]here a decision is very complex, the rule that is necessary to describe the desired result may be much more difficult to apply accurately than a standard aimed at the same result.”); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1060 (2006) (“Some regulatory policy areas may involve only a handful of really important questions. . . . This is conducive to a preference for delegation to agencies By contrast, for statutes that require application of general standards to the facts of particular cases on a more individualized basis . . . legislators would tend to favor delegation to courts because such statutes implicate a larger number of discrete interpretive issues . . .”).

281 See *supra* notes 47–54 and accompanying text.

A. Federal and State Bail Commissions

Careful consideration of the composition of the commissions formed by Congress and state legislatures is important, as structural decisions have lasting effects. In the sentencing context, Professor Rachel Barkow and others note that Congress largely isolated the Federal Sentencing Commission from political influence by creating an independent commission.²⁸² The Commission's members can be removed by the President only for cause.²⁸³ If Congress and state legislatures are similarly committed to avoiding the oftentimes small-yet-powerful interests' continued call for widespread pretrial detention, bail commissions, too, should be independent, with executive influence limited to initial selection of the members through a selection process constrained by Congress and legislatures.

In the sentencing context, Congress attempted to further constrain political influence by carefully directing the types of individuals whom the President should initially appoint, at first directing the President to select nonlegislative members (e.g., judges) to be on the Commission.²⁸⁴ Although the intentions behind this structure were valid ones—allowing too much political influence would perpetuate the tough-on-crime pressures faced by judges and legislators—Professor Barkow believes that over-isolation of the Commission constrains certain powers that the Commission needs in order to be effective.²⁸⁵ For example, Congress can currently strike down the Commission's proposed sentences, and the Commission has little recourse when this occurs.²⁸⁶ Forming a bail commission that includes at least one representative from the legislature might therefore be advisable—this would ensure a degree of isolation from often-changing political

²⁸² Barkow, *supra* note 74, at 717–18, 718 n.2; Bowman, *supra* note 135, at 1324 (noting that one of the goals in creating the Commission was to provide a body of experts that would have “some insulation from the distorting pressures of politics”).

²⁸³ Barkow, *supra* note 74, at 758.

²⁸⁴ Bowman, *supra* note 135, at 1323 (“Until 2003, the law required that at least three commissioners be federal judges. In 2003, the PROTECT Act abolished the requirement that there be any judges on the Commission and restricted the number of judges who might serve at any one time to no more than three.” (footnote omitted)); *see also* Barkow, *supra* note 74, at 758 (suggesting that Congress placed the Commission in the Judicial Branch precisely to enable judges to serve on the Commission).

²⁸⁵ *See* Barkow, *supra* note 74, at 801 (“One way to facilitate legislative support is to include members of the legislature on the commission . . .”).

²⁸⁶ For a discussion on Congress's increasing intervention in the Commission's work, including an amendment that “directed the Sentencing Commission to substantially reduce downward departures, [] limited to three the number of judges who can serve on the Sentencing Commission,” and increased the number of specific directives, *see* Bowman, *supra* note 135, at 1341–42.

forces but might give the commission more power.²⁸⁷ If the legislature objected to the commission's recommendations, its legislative member could attempt to lobby for and defend the recommendations within political debates.²⁸⁸

To ensure that an inclusive range of interests in pretrial detention is represented on the commissions and that the commissions have the expertise needed to write mandatory bail guidelines, in addition to trained criminologists and statisticians, the bail commissions should include judges, criminal defense experts, legislative representatives, and prosecutors.²⁸⁹ Because pretrial detention is administered at several levels, Congress should form a federal bail commission, and state legislatures should form a similar commission within each state. This would leave out the municipalities, which face their own pretrial detention costs and benefits as a result of county and city judges' bail determinations, but forming commissions and guidelines at this small of a level would be costly and would likely offset the benefits of reduced agency costs. Including municipal representation on each state commission could better incorporate municipal concerns.

Bail bondsmen have much to gain or lose from mandatory guidelines and thus might also need to be included in commission membership.²⁹⁰ This approach could perhaps overly restrain progress. The bail bondsman lobby has consistently and successfully resisted efforts to expand pretrial release or even to increase representation pretrial.²⁹¹ But for legislation forming bail commissions to have a chance of success, at least one representative of this industry will need to be included on the commission. Provided that the voting structure on the commission afforded each commission member only one vote, the representative of the bail bondsman industry would likely be unable to block the mandatory guidelines, although it would likely try to tilt them toward including money bail conditions—a move that might continue to generate too much pretrial detention.²⁹²

287 Cf. Barkow, *supra* note 74, at 800, 802 (encouraging inclusion of legislators on sentencing commissions to help “persuade political actors outside the commission of the wisdom of the agency’s policies” and noting state commissions that include legislators).

288 Cf. *id.* at 800, 802.

289 Cf. *id.* at 800–01 (in the sentencing context, advocating for a diverse commission membership that “enable[s] the commission to consider sentencing issues from a variety of perspectives that might otherwise be ignored”).

290 See *supra* notes 68–72, 99–102, and accompanying text.

291 See *supra* note 69 and accompanying text.

292 See *supra* notes 96–98 and accompanying text.

B. *The Content of Mandatory Bail Guidelines*

Just as legislatures can use sentencing commissions as a helpful model for forming bail commissions and predicting their likely success or failure, existing actuarial approaches for assessing dangerousness and likely flight risk in bail determinations provide a useful foundation to work from. Actuarial approaches, in contrast with bail schedules or sentencing guidelines, attempt to determine the factors that most accurately predict flight risk rather than relying on the average defendant or similarly rough metrics.²⁹³ Legislatures should direct bail commissions to write mandatory bail grounded in validated actuarial assessments. The actuarial model already used in the federal court system for one-sixth of defendants (which is currently paired with judicial discretion, leading to over-detention)²⁹⁴ and the Public Safety Assessment²⁹⁵ would be a good start, as would the model for dangerousness proposed and empirically tested by Professors Baradaran and McIntyre.²⁹⁶ As explained in Part II, the federal actuarial model uses a range of factors, such as the defendant's criminal history, family in the area, type of job and length of employment, and other data to generate scores on the likely dangerousness and flight risk of a defendant. Unlike the federal model, the risks of dangerousness and flight should be separately scored, as they are in the Public Safety Assessment.²⁹⁷ For predictions of dangerousness, Professors Baradaran and McIntyre suggest similar factors to those used to predict flight risk; they also suggest additional factors that can further improve the actuarial model.²⁹⁸

To convert this actuarial model into mandatory guidelines, the bail commissions should set at least three score thresholds for flight and dangerousness: thresholds representing low, moderate, and high flight risk, and low, moderate, and high dangerousness. For defendants with scores below the low thresholds for flight risk and dangerousness, the guidelines should mandate that judges release the defendants with a personal recognizance bond—a nonmoney bond that simply involves a promise by the defendant to appear at trial. For defendants with a flight risk score that is above the low threshold and a dangerousness score below the low threshold (those with relatively

²⁹³ Slobogin, *Dangerousness*, *supra* note 137, at 121–23; *supra* Part I.A.

²⁹⁴ See *supra* notes 245–46 and accompanying text.

²⁹⁵ See *supra* note 233 and accompanying text.

²⁹⁶ See *supra* notes 41, 111, and accompanying text.

²⁹⁷ See LAURA & JOHN ARNOLD FOUND., *supra* note 233, at 3.

²⁹⁸ Baradaran & McIntyre, *supra* note 4, at 553–54, 554 n.272.

high flight risk and low dangerousness), the guidelines should mandate that judges release the defendant with conditions like monitoring that would better ensure presence at trial, or money bail tied to the defendant's ability to pay (based on a percentage of the defendant's total available assets). This would change the current judicial use of money bail schedules, which set static bail amounts based on the charge involved and not on ability to pay—a practice that penalizes the poor and fails to incentivize wealthy defendants to show up for trial.²⁹⁹ For defendants with any level of flight risk and a dangerousness score above the high threshold (or perhaps moderate threshold, depending on the commission's deliberations³⁰⁰), judges should be required to detain the defendants.

In directing the formation of mandatory bail guidelines and requiring judges to follow these guidelines, legislatures should allow very limited judicial departure from them—perhaps only in circumstances where the prosecutor provides, by clear and convincing evidence, that despite an actuarial score projecting only low or moderate dangerousness, the defendant is in fact a danger to the community. Judges should also be able to depart where defendants can show the reverse—collecting clear and convincing evidence to demonstrate low dangerousness despite an actuarial score of moderate to high dangerousness. And if the actuarial instrument used to generate the score included the same factors that prosecutors or defendants attempted to use to demonstrate dangerousness (such as a previous offense) or the lack thereof (such as a defendant having strong family support), then this evidence should not be a basis for departure.³⁰¹ Allowing broader departures would return us to the present system, in which even judges that use actuarial models detain too many defendants by re-

299 See *supra* Part I.B.2. This occurs because the monetary amount is a small percentage of a wealthy defendant's total assets and is relatively trivial to the wealthy defendant.

300 Operationalizing the guidelines would of course require further thought by empiricists, but this threshold should perhaps be quantified to prevent judges from deeming a low-risk percentage to mean “high” risk. Evidence suggests that could occur. For example, in one study a majority of judges surveyed deemed a risk of dangerousness of twenty-six percent to be “high risk” that justified civil commitment, yet researchers suggest that if this risk were communicated as a seventy-four percent likelihood of the individual not being violent, judges would not deem civil commitment to be necessary. See Nicholas Scurich & Richard S. John, *The Effect of Framing Actuarial Risk Probabilities on Involuntary Civil Commitment Decisions*, 35 LAW & HUM. BEHAV. 83, 85, 88 (2011) (citing John Monahan & Eric Silver, *Judicial Decisions Thresholds for Violence Risk Management*, 2 INT'L J. FORENSIC MENTAL HEALTH 1 (2003)).

301 See generally Slobogin, *Dangerousness*, *supra* note 137. In addition to his published work, I am grateful to Professor Christopher Slobogin for his insights and discussions on this point in his comments on this Article.

viewing the actuarial recommendations and then relying on independent subjective risk assessments to make their final decision.³⁰²

As with the Federal Sentencing Guidelines, the question remains whether legislatures should be able to review the guidelines before they become effective.³⁰³ If the goal of the guidelines is to better align apparent legislative goals with judicial actions, then the answer is easy. But despite the ongoing pressure on legislatures to limit pretrial detention, particularly due to budgetary concerns, these pressures will wane in times of economic plenty,³⁰⁴ and legislatures are less swayed by the many valid yet largely ignored, justice-based, and constitutionally grounded arguments for pretrial release.³⁰⁵ And Congress is notorious for giving in to capture by small but highly powerful tough-on-crime interests,³⁰⁶ pressure that is only rarely offset by the large, dispersed, typically disorganized population that collectively experiences the very negative impacts of pretrial detention.³⁰⁷

If legislatures are truly committed to attempting to fix the broken pretrial process, they should likely bind themselves to having only limited ability to review the guidelines. As a compromise, the guidelines and commissions could perhaps periodically sunset, allowing legislatures to reconsider the composition of the commission and the extent of needed legislative influence over the guidelines. Legislatures would also retain some influence over the bail commissions if they included one or several legislative members on the commission, thus further allaying fears of unbounded independent agency control.³⁰⁸

Legislatures might prefer this limited influence in some cases. Granting control to an agency with the expertise to develop and adopt risk assessment tools and corresponding bail guidelines allows legislatures to pass some of the blame for measures viewed as “soft on crime” to the agency, yet also retain a degree of control over the con-

³⁰² See *supra* Part I.B.4.

³⁰³ See *supra* note 275 and accompanying text.

³⁰⁴ See, e.g., Barkow, *supra* note 26, at 1308–09 (“States may often ignore direct costs [of sentencing, such as incarceration costs], as well, when they are not facing budget pressures or when tough-on-crime rhetoric is necessary because of an actual or perceived increase in crime.”).

³⁰⁵ *Id.*

³⁰⁶ See Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1081, 1090–92 (1993) (describing legislatures’ consistent undervaluing of defendants’ rights).

³⁰⁷ *Id.*; see also *supra* note 103 and accompanying text.

³⁰⁸ Cf. Barkow, *supra* note 74, at 760–62 (describing design features that Congress implemented in the U.S. Sentencing Commission to provide the legislature greater control than it would have over a typical independent agency).

tent and application of the guidelines.³⁰⁹ While the use of mandatory guidelines has received strong criticism in the sentencing context,³¹⁰ the arguments for their use are fundamentally stronger pretrial, and a commission writing bail guidelines from a clean slate could benefit from our experience with sentencing.³¹¹

Legislatures, however, might be particularly wary of handing most of their discretion to bail commissions for fear of still bearing the brunt of the blame that judges currently receive when released defendants flee or commit crimes.³¹² Voters might make the connection to the legislature, noting that the legislature initially formed the commission. Although legislatures will balance the costs of pretrial incarceration with the costs of voter criticism for pretrial release errors,³¹³ the costs of blame might be so high that they will be reluctant to shift the current locus of blame from judges to themselves. However, the role of the commissions in establishing bail guidelines—and the judges that still make the ultimate, albeit limited-discretion bail decisions—may help diffuse some of the blame and lower the costs of voter criticism.

One significant barrier to implementation remains: although there are existing, carefully validated actuarial models that bail commissions could adopt with little modification,³¹⁴ someone must run the model for each individual defendant in the federal and state systems. Computers crunch the numbers, but for some of the models, humans must interview defendants and obtain data to input into the computer system.³¹⁵ The systems that currently use actuarial models that require interviews rely on pretrial services agencies to do this work, and

³⁰⁹ See *id.* at 717–18 (“A commission could, in theory, provide needed political cover for highly charged decisions.”).

³¹⁰ See, e.g., Bowman, *supra* note 135. But see Marvin E. Frankel & Leonard Orland, *Sentencing Commissions and Guidelines*, 73 GEO. L.J. 225, 225 (1984) (concluding prior to the Sentencing Reform Act requiring the establishment of guidelines “that a full-time, increasingly expert commission, with power to make and revise sentencing-guideline ranges, remains the best available approach to making criminal penalties rational, fair, and suitably adaptable to changing circumstances”).

³¹¹ See *supra* Part III.A.

³¹² *Supra* notes 60–61 and accompanying text.

³¹³ See *supra* notes 27–28 and accompanying text.

³¹⁴ See *supra* Part II.B.1–2.

³¹⁵ See *supra* Part II.B.1; cf. Joseph M. Zlatic, *An Assessment of District Reviews: Implications for Pretrial Services Policy Development and Practice*, FED. PROB., Sept. 2009, at 50, 50–51 (noting that in twenty-one percent of federal district courts’ pretrial services investigations reviews, there were “errors in the written report,” such as failing to complete a portion of the report but that there was a “relatively low rate of erroneous risk assessment”). Not all models require interviews, however. For example, the Public Safety Assessment does not require defen-

this approach seems reasonably effective.³¹⁶ Appointing individuals to repeatedly conduct interviews and input data—with careful guidelines and training for collecting accurate data and properly entering it into the system—builds up expertise and helps to ensure that the actuarial models will be relatively uniformly deployed.

C. *Objections and Responses*

In light of criticism of the United States Sentencing Commission, the guidelines it produces, and the relatively expansive change in pretrial detention practices that mandatory bail guidelines will produce, judges, policymakers, stakeholders, and scholars will likely raise a range of objections, which will be considered here. While all of these likely objections would require careful consideration, none seem to overcome the benefits that mandatory bail guidelines offer—namely, providing one of the few feasible means of curtailing currently high agency costs in the pretrial process and creating meaningful pretrial detention reform.

1. *General Objections to Quantitative Risk Assessment*

Professor Slobogin has extensively documented objections to quantitative approaches to predicting dangerousness in the sentencing, plea bargaining, and civil commitment contexts, noting concerns about the constitutionality of actuarial approaches, their accuracy, and their implementation.³¹⁷ This Article builds from his and others' work here, summarizing broad-based concerns and examining how they might apply in the bail context.

a. *Inaccuracy*

Despite the seemingly overwhelming evidence that actuarial assessments of individuals' risk are consistently more accurate than clinical assessments,³¹⁸ concerns about accuracy remain. These can likely be relatively quickly dismissed by pointing to the historic and ongoing studies of actuarial accuracy that continue to improve actua-

dant interviews in large part because officials indicated that interviews made actuarial models too resource-intensive to be practical. See *infra* text accompanying note 356.

³¹⁶ See *supra* Part II.B.1.

³¹⁷ While this Article references Professor Slobogin's work throughout this section, his most relevant recent piece, which organizes actuarial concerns as falling within the categories of constitutionality, accuracy, and implementation, is Slobogin, *Plea Bargaining*, *supra* note 137, at 24–34.

³¹⁸ See *supra* notes 137–38 and accompanying text.

rial models;³¹⁹ the fact that the federal government has spent years testing, validating, and improving its model for evaluating pretrial defendants' risks;³²⁰ and the ongoing testing and implementation of the Public Safety Assessment tool.³²¹ Thus, unlike clinical approaches, under which mental health experts rely on an array of different factors to assess likely risk and often do not disclose the factors they use, actuarial models follow a uniform approach—one that we can continue to assess and improve.³²² And although uniformity alone is no guarantee of accuracy, validation has greatly improved the accuracy of the models.³²³

We can further address accuracy concerns through research conducted outside of the assessment process, and through ongoing peer review of the models used by pretrial agencies. Professors Baradaran and McIntyre's empirically tested model, for example, shows promise for relying on scholars and others outside of the pretrial system to continue to provide suggestions for improving the accuracy of models.³²⁴ And the fact that even the existing, albeit flawed, models appear to be more accurate than judicial assessments—which involve nonclinician judges making highly varied dangerousness determinations—greatly alleviates these concerns.³²⁵ Of course, models can only be as accurate as their inputs, and equal care must be given to carefully collecting data about each defendant.

b. Impersonal Decisions

Another objection to quantitative risk assessment, whether in the pretrial, sentencing, or civil commitment contexts, is that the process is highly impersonal and fails to treat defendants as individuals. Yet, as Professor Slobogin notes in the context of general actuarial assessment, “statistical inference is individualized, or case-specific, in the sense that it predicts the chances that a certain individual, because of

³¹⁹ See *supra* notes 140–41 and accompanying text.

³²⁰ See Cadigan, *supra* note 141, at 30–31.

³²¹ See *supra* notes 233, 241–42, and accompanying text.

³²² See *supra* Part II.A.

³²³ See Lowenkamp & Whetzel, *supra* note 141, at 33 (conducting an empirical assessment of the federal pretrial risk assessment tool to identify the factors that most accurately predict risk); Lowenkamp et al., *supra* note 139, at 5 (describing an experimental project to validate a risk assessment tool); *supra* notes 210–19 (describing validation efforts).

³²⁴ See Baradaran & McIntyre, *supra* note 4, at 553 (“[O]ur predicted model can provide guidance for judges to make more efficient decisions and increase the number of people released pretrial while not causing increased danger to the public.”).

³²⁵ See *supra* notes 162–65 and accompanying text.

particular traits she possesses, will act out violently in the future.”³²⁶ To the extent that actuarial prediction of dangerousness and flight risk does unfairly lump defendants into groups and fails to offer an individualized assessment, other protections such as speedy trial apply,³²⁷ and they can partially limit the harm of pretrial detention based on an inaccurate prediction of dangerousness.³²⁸ More importantly, from a comparative perspective, even if a judge talking to a defendant about his past seems more personal than inputting numerous individualized factors into a model, the current bail system is already highly impersonal. As introduced in Parts I and II, judges already make stereotypes based on gender, family status, and other “group”-based factors,³²⁹ and it is not uncommon for numerous defendants to be

³²⁶ Slobogin, *Dangerousness*, *supra* note 137, at 125; *see also* Slobogin, *Plea Bargaining*, *supra* note 137, at 29 (refuting objections that “making . . . predictions about individuals based on data about groups is incoherent or impossible” and noting that clinical approaches involve the grouping of individuals into stereotypical classes). *But see* Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 806 (2014) (“[I]n the sentencing context, [t]he underlying regression models may provide reasonably precise estimates of the *average* recidivism rates for the group of offenders sharing the defendant’s characteristics, but the uncertainty about what an *individual* offender will do is much greater, and when it comes to predicting individual behavior, the models offer fairly modest improvements over chance.”).

³²⁷ U.S. CONST. amend. VI.

³²⁸ These protections are only partial, however. *See, e.g.*, Wiseman, *supra* note 5, at 1354 (“[D]espite speedy trial requirements, many defendants awaiting trial are detained for months.”).

³²⁹ There are concerns that existing (nonactuarial) judicial stereotypes used in the pretrial detention decision—as are permitted by the Bail Reform Act—would violate the Equal Protection Clause or substantive due process. However, the Court in *United States v. Salerno*, 481 U.S. 739, 747–48 (1987), rejected one substantive due process argument relating to the permissibility of “punishing” defendants pretrial before detaining them, finding that pretrial detention was not punishment and that the “[g]overnment’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest.” Challenges to bail on Equal Protection grounds have also failed, although these challenges, for the most part, have not addressed how bail treats individuals differently based, for example, on their family status. *See, e.g.*, *Schilb v. Kuebel*, 404 U.S. 357, 368–69 (1971) (affirming the constitutionality of a system that retained one percent of the bail for administrative bail costs but did not charge this same one percent fee of defendants released on personal recognizance); *Commonwealth v. Hendrick*, 257 A.2d 657, 667 (Pa. Super. Ct. 1969) (Hoffman, J., dissenting) (dissenting from a court’s affirmance of an order denying a request to be released without bail, but finding that consideration of factors that bear on the likelihood of appearance at trial, including “an accused’s residence, employment and family status,” does not violate the Equal Protection Clause); *see also* Slobogin, *Plea Bargaining*, *supra* note 137, at 25–27 (noting that the use of risk assessment factors like age, gender, and socioeconomic status “is justified when it serves the compelling state interest of efficiently allocating resources aimed at protecting the public from serious criminal acts” and describing the literature that raises equal protection concerns in this context); Wiseman, *supra* note 5, at 1394 n.228 (describing Professor Baradaran and others’ arguments that bail violates substantive due process, but noting the difficulty that these arguments face under current doctrine). Thus, al-

herded in to the courtroom at one time, with judges often giving each defendant slightly more than two minutes, at best, to make their case.³³⁰ Many of these defendants lack counsel,³³¹ and even if they have the benefit of a public defender, this defender often must scramble from one defendant to the next, frantically attempting through rapid communications with each defendant to understand the charges and find any indicia of nondangerousness and community ties that would prevent pretrial flight.³³² And if defendants could present clear and convincing evidence that contradicted the outcome of the risk assessment model, as proposed here, this would likely weaken any constitutional objections, as Professor Slobogin notes in the plea bargaining context.³³³

Further, the basis of some of the objections to the impersonal nature of mandatory bail guidelines would seem, at their core, to be largely one of accuracy. The argument is, essentially, that an actuarial model will fail to examine all factors relevant to a judge's assessment because a computer, rather than a person, has made the assessment.³³⁴ But to the extent the argument sounds in human dignity by objecting to the treatment of defendants as factors to be mechanically analyzed rather than as humans to be judged, it can only be said that the price of that individual treatment, measured in increased detention and its concomitant harms, seems too high to bear.³³⁵

though there are legitimate arguments for the unconstitutionality of detaining defendants pretrial or sentencing them on the basis of certain classifications that predict dangerousness, these arguments seem unlikely to make much headway in the bail context; *cf.* Starr, *supra* note 326, at 821 (arguing that evidence-based sentencing, which “formally incorporates discrimination based on socioeconomic status and demographic categories into sentencing,” may violate the Equal Protection Clause).

³³⁰ See Colbert et al., *supra* note 20, at 1755.

³³¹ See *id.* at 1719 (“Most states do not consider the right to counsel to apply until a later stage of a criminal proceeding—days, weeks or months after the pretrial release determination.”).

³³² For discussion of defender caseloads beyond the pretrial context, see Peter A. Joy, *Rationing Justice by Rationing Lawyers*, 37 WASH. U. J.L. & POL’Y 205, 207 & n.12 (2011).

³³³ Slobogin, *Plea Bargaining*, *supra* note 137, at 25–28.

³³⁴ See Slobogin, *Dangerousness*, *supra* note 137, at 124 (noting that a “criticism associated with actuarial prediction is that it cannot help neglecting pertinent characteristics of the individual evaluated”).

³³⁵ See *supra* notes 43–45 and accompanying text; *cf.* Slobogin, *Dangerousness*, *supra* note 137, at 125 (discussing actuarial assessments for dangerousness and responding to objections of the impersonal nature of this approach, noting “the fact remains that actuarial prediction is at least as accurate as clinical prediction at determining who is most likely to be violent”).

c. *Difficult Quantification*

Related to concerns about the impersonal nature of the actuarial assessment is the likely claim that as with sentencing, the pretrial decision is too complex to be subject to quantification.³³⁶ Indeed, this concern has partially proven to be true in the sentencing context, where judges report that after the introduction of sentencing guidelines, they now spend more time on each case and have difficulty forcing highly varied circumstances into one sentencing category.³³⁷ The sentencing decision is highly complex; individuals who have been convicted often have been convicted on numerous charges, and their sentence might also be affected by, *inter alia*, decisions about their character and remorse, their likely dangerousness, and previous convictions when three-strikes laws apply.³³⁸ The guidelines might simply be too rigid to afford justice to many defendants.³³⁹

The pretrial detention decision is also complex, of course, but the decisions to be made are narrower and more easily quantified.³⁴⁰ The judge's task is not to mete out a nuanced sentence based on a range of character- and charge-based factors, but rather to ask a relatively simple question: is the defendant likely to flee or commit a crime while awaiting trial?³⁴¹ And this question is somewhat more easily quantified. Because computers more accurately project dangerousness than judges (although there is still room for improvement in computer models)³⁴² and because justice in the pretrial process relies largely on

³³⁶ See Dau-Schmidt, *supra* note 58, at 661 (arguing that the “use of rules by the principal to control agency costs will be less effective with more complex tasks because the administrative and overbreadth costs of using a rule rise with the complexity of the task”).

³³⁷ *Id.* at 673–74 (noting that judges report having to spend more time on sentencing since the introduction of the guidelines (citing FED. COURTS STUDY COMM., *supra* note 277, at 137)).

³³⁸ See *id.* at 665 (describing a “decision or task as more complex when it involves a greater number of factors that must be taken into account to successfully execute the decision or task consistent with the interests of the principal”).

³³⁹ FED. COURTS STUDY COMM., *supra* note 277, at 137–38 (recognizing “defendant’s personal history, including such factors as age and employment history” as relevant to the sentencing decision yet not permitted to be considered under the federal sentencing guidelines).

³⁴⁰ Compare *id.*, with Lowenkamp & Whetzel, *supra* note 141, at 34 (identifying “number of prior felony convictions, number of prior failure-to-appears, pending charges, current offense type, current offense level, age at interview, highest educational level, employment status, home ownership, and substance abuse” as examples of “specific measures used in the development and validation” of an actuarial risk assessment instrument).

³⁴¹ See Lowenkamp & Whetzel, *supra* note 141, at 33 (describing “the scope of the court’s concern [at the pretrial hearing stage] to include not only a defendant’s future court appearance but also the safety of the community”).

³⁴² See *supra* Part II.A.

accurately assessing risks,³⁴³ relying on the superior quantifier of risk seems preferable.

d. Disparate Treatment of Defendants

A final, important objection to deciding bail based on actuarial predictions is that the bail guidelines would entrench existing disparities within the criminal justice system—a concern often raised in the sentencing context.³⁴⁴ The U.S. system of arresting, charging, detaining, convicting, and imprisoning defendants is notoriously discriminatory. Police disproportionately target African-American individuals in making traffic stops and arrests,³⁴⁵ and the percentage of African Americans imprisoned (controlling for crime rate) is extremely high, both viewed independently and as compared to other groups.³⁴⁶ Because it is more likely that an African-American individual will be arrested and charged, making pretrial determinations partly on the basis of criminal history and current charges can increase the likelihood that this individual will be detained pretrial, thus continuing the disparate treatment that begins even before arrest. The current system, in which judges have a great deal of discretion, is subject to their explicit or implicit biases, but objective standards can be just as problematic as subjective ones in entrenching bias.³⁴⁷

³⁴³ See *supra* notes 43–45 and accompanying text.

³⁴⁴ See, e.g., Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991–1992*, 31 LAW & SOC'Y REV. 789, 793–96 (1997) (showing how ethnicity and race contributed to sentencing disparities); Reva Siegel, Foreword, *Equality Divided*, 127 HARV. L. REV. 1, 50 (2013) (noting how judicial review standards requiring a showing of purposive discriminatory impact caused courts to repeatedly reject challenges to “federal sentencing guidelines that imposed a 100:1 ratio in penalties for crack compared to powder cocaine”); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1472–73 (2008) (identifying the “crack-powder” disparity as one of the few areas where “opposition to the [Sentencing] Guidelines regime” achieved “public salience,” but describing how judges routinely rejected challenges to this portion of the guidelines).

³⁴⁵ See, e.g., MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 111–13 (1995) (showing major disparities between drug arrests of White and African-American individuals); Wesley MacNeil Oliver, *With an Evil Eye and Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1413, 1477–78 (2000) (noting disproportionate traffic stops for “disfavored groups” and the describing the New Jersey case—a case that resulted in a consent decree—which highlighted this practice).

³⁴⁶ MARC MAUER & TRACY HULING, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1 (1995) (describing the high percentages of African-American males in the criminal justice system); TONRY, *supra* note 345, at 28–30 (describing the increasingly disproportionate representation of African Americans in jail, despite crime rates remaining relatively steady, and surveying studies).

³⁴⁷ See Siegel, *supra* note 344, at 22–23 (noting “‘good-faith, colorblind decisions’ that might foreseeably or knowingly entrench racial segregation” (quoting *Columbus Bd. of Educ. v.*

Although this is a serious concern, there is reason to believe that actuarial bail guidelines could reduce racial disparities. Because the models make testable predications, the outcomes of which can be tracked,³⁴⁸ it is possible to detect and correct for disparate impacts. Although no bail decisionmaking process can solve overcharging and arrest problems, the bail guidelines can be written to avoid the addition of *further* additive bias at the bail stage. Guideline developers can accomplish this by testing whether defendants of different races and backgrounds receive different bail decisions despite facing the same charges and exhibiting the same characteristics. If the guidelines produce additive bias, the factors used to indicate low, moderate, or high risk of flight and dangerousness can be modified and tested to eliminate this bias. Indeed, the bail commissions that set the guidelines should be explicitly charged with the task of testing for and addressing any additive bias that might result. And although the potential for discriminatory impacts remains a serious concern, the early results are promising: the Arnold Foundation was aware of the potential for discriminatory results and reports that its model produces race- and gender-neutral results.³⁴⁹

More broadly, any type of bail decision, whether actuarial or clinical, will likely rely to some extent on the type of charges the defendant faces, and bail practices cannot solve the broader discriminatory problems inherent to the criminal justice system. Tackling these larger problems would require a wholesale revision of arrest and charging practices. But the guidelines can, and should, avoid adding discrimination to an already flawed system; because actuarial models (as compared to judicial discretion) are more easily tested for bias and can be modified to avoid bias, they are superior to the current approach, although they are by no means perfect. Moreover, the fact that fewer people were detained pretrial after certain jurisdictions introduced actuarial assessment into its pretrial system³⁵⁰ suggests that guidelines can, to some degree, help moderate the pattern of arrest, overcharging, pretrial detention, guilty pleas, and prison time.

Penick, 443 U.S. 449, 510 (1979)); Stith, *supra* note 344, at 1437–40 (describing how the Sentencing Guidelines attempted to make the sentencing process more uniform by assigning just one person—a probation officer—to identify facts, make an “initial calculation of the defendant’s Guidelines range” for the judge based on the Guidelines; and noting that one flaw of this system, which resulted in racial disparities and other problems, was that it “directly constrained only judges,” not prosecutors).

³⁴⁸ See *supra* Part II.A.

³⁴⁹ See LAURA & JOHN ARNOLD FOUND., *supra* note 210.

³⁵⁰ See *supra* note 232.

2. Cost

As is the case with any proposal, and particularly for proposals to improve the functioning of the criminal justice system, costs are a concern. Legislatures are still wrestling with budget problems created by the slow recovery from the 2008 recession, and are generally hesitant to expend tax dollars on criminal justice reform.³⁵¹ The costs of the commissions and pretrial services agencies themselves would likely be relatively low—the annual budget for the U.S. Sentencing Commission was \$17 million in 2013,³⁵² and it was \$4 million for federal pretrial services and probation (excluding the federally funded pretrial services agency that serves Washington, D.C. courts).³⁵³ And as discussed above, pretrial risk assessments, which do not require detailed analysis of culpability, would likely be less expensive.³⁵⁴ States that wished to avoid these costs, moreover, could probably rely on the outputs of other commissions. Moreover, a growing number of states, along with the District of Columbia, already have pretrial services agencies,³⁵⁵ thus alleviating the need to form new and expensive institutions in these cases. Indeed, as introduced in Part II, the soon-to-be nationally applicable Public Safety Assessment does not require resource-intensive defendant interviews.³⁵⁶ But, for the many jurisdictions that do not already have robust pretrial services agencies with personnel to conduct the necessary interviews and collect defendant data, the additional costs would be more significant. The existing evidence strongly suggests that these expenditures would be more than

³⁵¹ See *supra* 93–94 and accompanying text.

³⁵² OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE U.S. GOV'T 61 (2013) (on file with *The George Washington Law Review*).

³⁵³ *Id.* at 54, 58 (explaining that this budget includes pretrial services officer salaries and benefits). The federally funded Washington, D.C., pretrial services agency is more expensive, with a budget of \$29.4 million in fiscal year 2014 (excluding the cost of “drug specimen collection” and “drug testing”). Clifford T. Keenan, Pretrial Servs. Agency for the District of Columbia, *It's About Results, Not Money*, PRETRIAL SERVS. AGENCY FOR D.C., <http://www.psa.gov/?q=node/499> (last visited Feb. 14, 2016). This expense might be in part due to the fact that the Agency is not housed within another agency or division and thus includes “administrative support functions” that other pretrial services agencies typically do not shoulder. *Id.*

³⁵⁴ See *supra* note 341 and accompanying text.

³⁵⁵ See, e.g., PRETRIAL SERVS. AGENCY FOR THE DISTRICT OF COLUMBIA, CONGRESSIONAL BUDGET JUSTIFICATION AND PERFORMANCE REQUEST: FISCAL YEAR 2014 3 (2013), <http://www.csosa.gov/about/financial/budget/2014/FY14-PSA-Budget-Submission.pdf> (describing the Pretrial Services Agency for Washington, D.C., a federal agency created under the District of Columbia Bail Agency Act of 1967 that conducts “a risk assessment for every arrested person who will be presented in court” and “formulat[es] release or detention recommendations based upon this risk assessment”).

³⁵⁶ LAURA & JOHN ARNOLD FOUND., *supra* note 233, at 4–5.

offset by the resulting declines in detention and its associated costs,³⁵⁷ but it could still be difficult to persuade some legislatures to act. In these circumstances, as a second-best approach, jurisdictions with legislatures who refused to implement mandatory guidelines could still reduce agency costs by following the weaker options discussed in Part I. While tracking and publishing judges' release rates³⁵⁸ and enacting legislation that requires judges to give due consideration to actuarial data have some costs,³⁵⁹ they are likely far lower³⁶⁰ than implementing this Article's guidelines-based system.

3. *Constitutional Objections*

In light of numerous and sometimes successful constitutional challenges to the sentencing guidelines,³⁶¹ critics will likely argue that similar constitutional concerns arise with mandatory bail guidelines. Yet the bail process is sufficiently different from sentencing to avoid most of these concerns.

Sixth Amendment rights to a jury trial do not attach in the bail context—although some scholars have argued that they should³⁶²—thus making *Blakely v. Washington*³⁶³ and *United States v. Booker*³⁶⁴ largely inapplicable to the pretrial process. In *Blakely* and *Booker*, the Seventh Circuit and the Supreme Court addressed the problem of the sentencing guidelines' requirement that judges make certain find-

³⁵⁷ See, e.g., PEPIN, *supra* note 35, at 8 (describing how in 2010 “Harris County[, Texas,] gained \$4,420,976 in avoided detention costs and pretrial services fees collected after deducting for the costs of pretrial services”); Keenan, *supra* note 353 (citing high jail costs and arguing that “[p]erhaps the best reason that any jurisdiction should provide the necessary funding for an effective pretrial services function is that anything less actually costs more”). The Agency spends approximately \$29.4 million annually on 21,000 cases, or \$1408 per case, whereas cities like New York spend approximately \$45,000 to jail each pretrial detainee. See Keenan, *supra* note 353; CRIMINAL JUSTICE SECTION, AM. BAR ASS'N, *supra* note 26, at 5.

³⁵⁸ See *supra* notes 84–86 and accompanying text.

³⁵⁹ See *supra* Part I.B.4.

³⁶⁰ See, e.g., *State Profiles*, BUREAU JUST. STAT., www.bjs.gov/index.cfm?ty=tp&tid=481#Summary (last visited Feb. 14, 2016) (showing Bureau of Justice Statistics grants to states, which are distributed in exchange for permission to collect and publish certain information about the recipient state's criminal justice system, with grant amounts typically under \$200,000 per state).

³⁶¹ See, e.g., *United States v. Booker*, 543 U.S. 220, 245 (2005) (changing Federal Sentencing Guidelines from having mandatory to advisory status because the mandatory Guidelines created an unconstitutional judicial role in sentencing).

³⁶² See Appleman, *supra* note 7, at 1365–66 (arguing for “bail juries” in part because “[a]llowing the community to observe and participate in the routine preventative detention hearing of a domestic defendant . . . would vindicate a number of rights, including . . . the Sixth Amendment's jury trial right”).

³⁶³ *Blakely v. Washington*, 542 U.S. 296 (2004).

³⁶⁴ *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), *aff'd*, 543 U.S. 220 (2005).

ings of fact about defendants and set sentences accordingly, without much ability to depart from the mandatory sentence.³⁶⁵ These factual findings were constitutionally within the “province of the jury,” not the judge.³⁶⁶

In the pretrial context, on the other hand, in addition to the lack of any jury right, the Supreme Court has emphasized that the Eighth Amendment’s prohibition on excessive bail imposes very little restraint on the government’s pretrial methods and outcomes.³⁶⁷ It simply requires that the government’s method of assuring the defendant’s presence at trial not be substantially broader than necessary to achieve governmental interests, such as preventing dangers to society.³⁶⁸

Further, the Supreme Court emphasized in *United States v. Salerno*³⁶⁹ that Congress has a strong interest in protecting public safety and may accordingly direct judges in their pretrial determinations.³⁷⁰ Although it did not directly address a separation of powers claim, this language would likely counter any arguments that mandatory guidelines handed down by a commission created at the behest of Congress unconstitutionally interfered with judicial powers.³⁷¹ Equal Protection objections to mandatory bail guidelines seem similarly unlikely to succeed, assuming the actuarial model avoids the use of suspect classifications.³⁷² And any procedural due process concerns are probably mitigated by allowing departures from actuarial predictions on de-

³⁶⁵ See *Blakely*, 542 U.S. at 304; *Booker*, 375 F.3d at 511–12.

³⁶⁶ See *Booker*, 375 F.3d at 512 (Posner, J.) (“The finding of facts (other than the fact of the defendant’s criminal history) bearing on the length of the sentence is just what the Supreme Court in *Blakely* has determined to be the province of the jury.”); see also *Blakely*, 542 U.S. at 304 (noting the case involved a Sixth Amendment issue and that “[w]hen a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ and the judge exceeds his proper authority.” (citation omitted) (quoting 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE; OR, PLEADING, EVIDENCE, AND PRACTICE IN CRIMINAL CASES § 87, at 55 (2d ed. 1872))).

³⁶⁷ *United States v. Salerno*, 481 U.S. 739, 753 (1987) (“[W]e reject the proposition that the Eight Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release.”).

³⁶⁸ *Id.* at 747 (“Nor are the incidents of pretrial detention excessive in relation to the regulatory goal Congress sought to achieve.”).

³⁶⁹ *United States v. Salerno*, 481 U.S. 739 (1987).

³⁷⁰ *Id.* at 749 (“The government’s interest in preventing crime by arrestees is both legitimate and compelling.”).

³⁷¹ See *id.*

³⁷² See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (noting that suspect classifications “are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy”).

fendants' submission of clear and convincing evidence refuting the prediction.³⁷³

4. Lobbying Pressures

Beyond constitutional objections, opponents of mandatory bail guidelines are likely to point out that judges, although sometimes elected, might be less subject to lobbying pressures than an appointed commission. A growing public choice literature has, after all, recognized that agencies might be as susceptible to narrow special interest groups' lobbying pressures as Congress is, or even more so.³⁷⁴

This is a valid concern, but again, the current system is likely worse. The mandatory bail guidelines process would at least be relatively open and transparent—provided that Congress included adequate measures for notice-and-comment rulemaking and opportunities for public review.³⁷⁵ And this open, relatively centralized process seems far superior, from an accountability perspective, to the thousands of discrete bail decisions made by judges around the country, often in the course of only several minutes.³⁷⁶

From an efficiency perspective, it will be far cheaper, and likely more effective, to monitor the actions of one federal bail commission and fifty state commissions than it will be to monitor individual judges; to the extent that a system of improved monitoring instead relied on expanded attorney representation in the bail process, attorneys would have varied competency and resources, and thus

³⁷³ See *supra* note 333 and accompanying text.

³⁷⁴ See, e.g., Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1241, 1280 (1989) (arguing that “[h]istory provides numerous examples of agency capture by the narrow constituency the agency was created to control” and that the judiciary should play a role of making agencies more accountable to the electorate, their principals); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 350–56 (1974) (providing one of the early, classic accounts of agency capture); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 100–06 (2000) (summarizing the public choice literature and the subset of capture theory as applied to agencies but noting scholarship that also defends agency independence and accountability).

³⁷⁵ This same benefit has been noted in the sentencing context. See, e.g., Bowman, *supra* note 135, at 1328 (noting that at least in theory, “bringing law to sentencing promotes transparency, such that one can ascertain from the record many, if not all, of the factors which were dispositive in generating the final sentence”); *id.* at 1347 (noting that the sentencing guidelines brought “sentencing decisionmaking into the light in an unprecedented way” and that “[n]ot only do judges now impose sentences that correlate directly to identified sentencing factors, but the Commission’s ongoing work in gathering and disseminating sentencing data has made informed discussion about those factors possible”).

³⁷⁶ See *supra* note 20 and accompanying text; Bowman, *supra* note 135, at 1347.

nonuniform monitoring effectiveness. Although centralized, relatively accessible commissions would be at a much higher risk of capture, procedural protections could mitigate this risk.³⁷⁷

5. *The Potential for Overcharging*

Much of the criticism against the sentencing guidelines, which have generally had the seemingly unintended effect of creating longer sentences,³⁷⁸ might also be raised in the bail context. Much of the increase in sentence length appears to be the result of prosecutors taking advantage of required sentence lengths and overcharging to rack up as many threatened years of imprisonment as possible, without the potential for a judicial safety valve, thus contributing to longer average sentences.³⁷⁹

Bail guidelines seem unlikely to further incentivize overcharging, and, if anything, they might reduce it. Prosecutors focus primarily on the sentence when they charge a defendant—the pretrial process is a short step toward what the prosecutor hopes will be a quick plea with a relatively harsh sentence, a result that will generate praise and “points” in the prosecutor’s career.³⁸⁰ But prosecutors might sometimes overcharge in order to reduce the likelihood that the defendant will be released pretrial³⁸¹ because in both the federal and state contexts, judges are directed to automatically detain defendants facing certain types of charges.³⁸² Prosecutors who were particularly worried about the defendant’s dangerousness or possibility of flight might use this law to their advantage.³⁸³ Mandatory bail guidelines could make the criminal charge only one factor of many to be considered in a defendant’s likely dangerousness, thus removing the strength of the

³⁷⁷ See Spence & Cross, *supra* note 374, at 99–100, 99 n.14.

³⁷⁸ See, e.g., Barkow, *supra* note 26, at 1277 (“The politics of sentencing over the past three decades have consistently produced longer prison terms and an escalation in tough-on-crime rhetoric, regardless of whether crime rates have been going up or down.”).

³⁷⁹ *Id.* at 1282–83.

³⁸⁰ See Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851, 863 (1995) (“The prosecutor can, and regularly does, use discretion in charging to influence greatly a defendant’s decision to plead guilty in any particular case.”).

³⁸¹ See *supra* note 74 and accompanying text (exploring prosecutors’ likely incentives against pretrial reform); cf. Herbert L. Packer, *Two Models of the Criminal Process*, 113 *U. PA. L. REV.* 1, 39–41 (1964) (suggesting prosecutors believe that “[i]f the present system of requiring bail for some reason or other stopped producing a high rate of pretrial confinement, it would have to be replaced by one that did.”).

³⁸² See Miller & Guggenheim, *supra* note 42, at 392–95, 396 n.326.

³⁸³ See *id.* at 340.

charge in ensuring pretrial detention.³⁸⁴ And to fully eliminate the importance of the charge to pretrial decisions, the guidelines would ideally require consideration of the defendant's conduct—not the charge—in the actuarial model predicting dangerousness and flight risk. Furthermore, because prosecutors' charging decisions are typically tied directly to sentencing,³⁸⁵ mandatory bail guidelines seem unlikely to change their charging calculus.

6. *The Failure to Adequately Capture Municipal Costs and Benefits*

A final objection to mandatory bail guidelines is that if the objective is to align governments' bail incentives more closely with judges', and particularly to capture governments' cost-benefit assessment of pretrial detention, municipalities will be left out of this process. A federal bail commission and state commissions would write the mandatory bail guidelines proposed here; this might omit the concerns of the many cities and counties that pay for the costs of constructing and maintaining jails. But as introduced above, creating thousands of municipal bail commissions to write their own guidelines would be enormously costly and would offset many of the benefits of curtailing agency costs.³⁸⁶ Including municipal representatives on state commissions would at least partially capture municipal cost concerns within the guidelines created and would avoid the costs of municipal commissions.

CONCLUSION

The bail system is stubbornly resistant to reform. Its problems have been known for decades, but detention rates remain high, and in some cases are even rising. One promising path of reform—the use of actuarial models to better predict dangerousness—has made some inroads. The federal courts use actuarial models for approximately one-sixth of criminal defendants,³⁸⁷ and a growing number of states have pretrial agencies input data into actuarial models and make recommendations to judges regarding the defendant's pretrial status.³⁸⁸ The ongoing testing of a nationally applicable actuarial model for projecting flight risk and dangerousness further demonstrates the potential of

³⁸⁴ See *id.* at 377–79.

³⁸⁵ See Meares, *supra* note 380, at 863.

³⁸⁶ See *supra* Part III.C.2.

³⁸⁷ See *supra* note 246 and accompanying text.

³⁸⁸ See *supra* notes 220–43 and accompanying text.

actuarial approaches in pretrial release decisions.³⁸⁹ Yet all of these systems, and the sparse literature proposing their use in the bail context,³⁹⁰ rely on judges to make the final determination. And, as described in this Article, judges' incentives are skewed in favor of detention: they face few penalties for detaining low-risk defendants, receive no praise for correctly releasing them, and bear the brunt of public criticism for releasing defendants who go on to evade trial or commit violent crimes.³⁹¹ Judges do not bear the societal costs associated with pretrial detention.

This Article has provided a theoretical basis for the importance of reducing agency costs and improving accuracy in bail decisions through the use of mandatory bail guidelines based on actuarial models. As it stands, legislatures' goals to expand pretrial release—incentives embodied within existing statutes directing judges how to make pretrial decisions—have not been faithfully carried out by their judicial agents, due, in part, to the significant divergence between judges' and legislatures' incentives.³⁹²

Other solutions are possible—legislatures could better monitor their judicial agents by appointing attorneys to represent defendants at pretrial hearings or by eliminating the use of money bail.³⁹³ But both of these approaches are politically difficult as a result of strong bail bondsmen influence³⁹⁴ and the expense of inserting an attorney-monitor into each of the thousands of pretrial hearings that occurs annually.³⁹⁵ More promisingly, albeit more modestly, judges' bail decisions could be tracked, rated, and made available to public.³⁹⁶ None of these solutions would be as effective at reducing agency costs as limiting judicial discretion through mandatory, actuarial guidelines. The commissions implementing the guidelines—unlike judges—would be sensitive to both the costs and the benefits of pretrial release.

While the sentencing guidelines have shown that implementing this type of system can be difficult, pretrial decisions are meaningfully different: they involve a more limited set of questions relating to dangerousness and flight risk that are more easily quantified than

³⁸⁹ See LAURA & JOHN ARNOLD FOUND., *supra* note 233, at 4–5; *supra* note 245 and accompanying text.

³⁹⁰ See *supra* notes 40–41 and accompanying text.

³⁹¹ See *supra* Part I.A.

³⁹² See *supra* Part I.

³⁹³ See *supra* Parts I.B.1–2.

³⁹⁴ See *supra* notes 99–102 and accompanying text.

³⁹⁵ See *supra* notes 91–95 and accompanying text.

³⁹⁶ See *supra* notes 84–86 and accompanying text.

nuanced considerations that go into punishment decisions.³⁹⁷ Other objections, too, such as the imperfect and impersonal nature of actuarial models, have little force in light of how impersonal and inaccurate the current system is.³⁹⁸ Mandatory guidelines represent a path forward, and in the current era of shrunken budgets and declining crime, change may be achievable. But even if that path is not taken, it is clear that to fix bail, we must address the principal-agent problem at the heart of the system.

³⁹⁷ See *supra* Parts III.C.1.c.

³⁹⁸ See *supra* Parts III.C.1.a–b.